Supreme Court, U.S.
FILED
JUN 15 1995

CASE NO. 95-80

***

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court's December 21, 1994, PER CURIAM Affirmance is tantamount to the approval of striking Petitioners' pleadings and the entry of a default judgment as a discovery sanction pursuant to Rule 37 of the Federal Rules of Civil Procedure, where no order exists that had been disobeyed by the Petitioners?

2. Whether the Eleventh Circuit Court's affirmance of the lower courts' default judgment violated the property rights in derogation of the Fifth Amendment to the United States Constitution by denying due process, and is a departure from the accepted course of judicial review, and conflicted with its own opinions and the opinions of other Circuit Courts and opinions of this Court?

3. Whether the Eleventh Circuit Court's affirmance of the denial of a jury trial timely demanded by Petitioners in a non -core proceeding, violated the Seventh Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING BELOW

1. DANIEL L. BAKST, ESQ.
   Plaintiff/Respondent
   (Trustee for Debtor
   SUN-ISLAND REALTY, INC.
   a Florida corporation)

2. HONORABLE RICHARD BOHANON
   (visiting judge who issued
   default judgment)

3. LESLIE GERN CLOYD, ESQ.
   (Attorney for Trustee)

4. HONORABLE A. JAY CRISTOL
   (Bankruptcy Judge)

5. KENNETH V. HEMMERLE, SR.
   (Defendant/Petitioner)

6. KING OF CLUBS, INC.
   a Florida corporation
   (Defendant/Petitioner)

7. S.I.R. INVESTMENT & DEV., INC.
   a Florida corporation
   (Defendant/Petitioner)

8. ALEXANDER M. SIEGEL, ESQ.
   (Attorney for corporate parties)

9. SUN-ISLAND REALTY, INC.
   (Debtor)

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REFERENCE TO OPINIONS DELIVERED IN THE DISTRICT COURT AND THE BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

1. Final Default Judgment for Plaintiff in the Bankruptcy Court arising from an ore tenus motion without notice of hearing and based on perjured testimony by counsel for the Trustee. This Judgment was entered on May 19, 1992, as a sanction for failure to timely produce certain documents as requested by the Plaintiff by discovery request when such request had been produced in the first instance some 4 months prior to the entry of the Final Default Judgment. No order exists that shows a disobedience of any discovery request. This Default Judgment is reprinted in the Appendix hereto at p. A.17-21, *infra*.

2. Order of the District Court for the Southern District of Florida affirming the Final Orders and Final Judgment of the Bankruptcy Court dated the 27th day of October, 1993. This Order is reprinted in the Appendix hereto at p. A.6-16, *infra*.

The above orders, judgment and opinions were appealed to the Circuit Court of Appeal for the Eleventh Circuit, and gave rise to the per curiam affirmance without opinion entered by the Circuit Court of Appeal for the Eleventh Circuit as the judgment under review to this Court in support of Petitioners' Petition for a Writ of Certiorari. This Order is reprinted in the Appendix hereto at p. A. 5, *infra*.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

KENNETH V. HEMMERLE, SR.,
S.I.R. INVESTMENT & DEVELOPMENT, INC.,
and KING OF CLUBS, INC.

Petitioners,

-VS-

DANIEL L. BAKST, As Trustee for
SUN-ISLAND REALTY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, **KENNETH V. HEMMERLE, SR., S.I.R. INVESTMENT & DEVELOPMENT, INC.,** and **THE KING OF CLUBS, INC.,** respectfully pray that a Writ of Certiorari issue to review the judgment by per curiam affirmance of the Eleventh Circuit Court of Appeal, entered in

the above-entitled proceedings on December 21, 1994, and the denial of Petition for Rehearing and suggestion of Rehearing En Banc dated February 24, 1995. The decisions were an absolute denial of due process and violated the Fifth and Seventh Amendments to the United States Constitution.

OPINIONS BELOW

The judgment of the Court of Appeals for the Eleventh Circuit by its per curiam affirmance without opinion has not been reported, and is reprinted in the Appendix hereto at p. A-5, *infra*. The Circuit Court denied petition for rehearing and en banc consideration on February 24, 1995. (p. A. 3-4, *infra*). The Order of the District Court affirming Final Orders and Final Judgment of the Bankruptcy Court dated October 27, 1993. (p. A.6-16, *infra*). The Bankruptcy Court's Final Judgment for Plaintiff after default dated May 19, 1992. (p. A. 17-21, *infra*).

JURISDICTION

The unpublished PER CURIAM decision of the Eleventh Circuit Court of Appeals was entered on December 21, 1994. The Court of Appeals further denied Rehearing and Suggestion of Rehearing En Banc on February 24, 1995.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution:

The Fifth Amendment to the United States Constitution.

The Seventh Amendment to the United States Constitution.

Statutes:

Title 28 U.S.C. § 1254(1)
Title 11 U.S.C. §§ 547 - 548

Federal Rules of Civil Procedure:

Rules 37 - 55

Bankruptcy Rules:

Rules 7037 - 9001

STATEMENT OF THE CASE

DANIEL L. BAKST, as Trustee in bankruptcy, filed a complaint in the United States Bankruptcy Court in and for the Southern District of Florida. The complaint was served upon the Defendants August 1, 1991. During the course of the lawsuit, Plaintiff sought the production of documents which were provided at a deposition decus tecum. Plaintiff failed and refused to seek copying of the documents since she could not determine the meaning of all documents produced, which were approximately 250 pounds of documents. The facts relating to these proceedings are more fully set forth under the statement of the facts.

At Calendar Call on May 19, 1992, Plaintiff made an ore tenus motion to strike all pleadings and enter a default judgment against the Defendants for their failure to timely provide the documents requested. The

ore tenus motion was granted and the written order was entered on May 19, 1992. (p. A. 17-21).

The Defendants' filed a Notice of Appeal to the United States District Court who entered an order affirming the final order and final judgment of the Bankruptcy court on October 27, 1993. (p. A. 6-16).

The Defendants/Appellants appealed that order to the United States Court of Appeals for the Eleventh Circuit. (p. A. 1-2).

On December 21, 1994, the Eleventh Circuit Court of Appeals entered a judgment affirming per curiam without opinion the order of affirmance of the District Court for the Southern District of Florida. (p. A. 5). It is from the Order of judgment of the United States Court of Appeal for the Eleventh Circuit that Petitioners seek a Writ of Certiorari.

STATEMENTS OF THE FACTS

On the 16th day of May, 1980, **KENNETH V. HEMMERLE, SR.** (hereinafter **HEMMERLE**), entered into a Conditional Trust Agreement (p. A. 22-24, *infra*) with **SUN-ISLAND REALTY, INC.** (hereinafter **SUN**), permitting **SUN** to hold real property as security for guarantees on loans and improvements. On September 19, 1989, SUN returned all real property held in trust by virtue of the trust agreement (p. A. 25-27, *infra*).

On September 26, 1990, SUN filed a Chapter 11 proceeding. On January 14, 1991, **DANIEL L. BAKST** (hereinafter "**BAKST**") was appointed Trustee.

On July 26, 1991, **BAKST** filed an Adversary Complaint styled as Case No. 91-0658-BKC-AJC-A, naming Appellants, **KENNETH V. HEMMERLE, SR., S.I.R. INVESTMENT & DEVELOPMENT INC.**, and **KING OF CLUBS, INC.** On August 12, 1991, **HEMMERLE** filed a Motion to

Dismiss the Adversary Complaint, alleging that the Court lacked jurisdiction over (1) the subject matter, (2) over Defendant **HEMMERLE** or any other named Defendant, and (3) the Complaint failed to state a claim upon which relief could be granted. On August 26, 1991, Defendants collectively filed a Motion to Dismiss. On September 23, 1991, both motions to dismiss were heard, and on October 4, 1991, the Court entered its order denying the Motions. On October 12, 1991, Defendants filed a Motion for Rehearing and Objection to Findings and Order. No order was ever entered regarding Defendants' Motion for Rehearing.

On December 18, 1991, Plaintiff filed a Request for Production of Documents on all Defendants. On December 31, 1991, Defendants filed a Response to Plaintiff's request for production of documents, stating "any and all documents requested by Plaintiff which are

in the possession or under control that contains evidence, not privileged relating to the subject matter of this action will be available for inspection and copying at 808 Northeast Third Avenue, Fort Lauderdale, Florida 33304, upon reasonable notice."

Pursuant to a notice of deposition duces tecum of **HEMMERLE**, **HEMMERLE** produced all documents in his possession or in the possession of the co-defendants to **CYNTHIA A. REED, ESQ.** as examiner for the Plaintiff. Ms. Reed inspected the documents, but failed to seek the copying of same, and upon conclusion of the deposition, left without the documents sought by the duces tecum.

On May 1, 1992, the Court set Calendar Call for May 18, 1992. The trial was to start sometime following Calendar Call. Notwithstanding that the Defendants had made a timely demand for a jury trial, Defendants were uncertain as to whether or not the cause

would be tried by a jury, and for that reason, Defendants on May 12, 1992, filed a motion for clarification and objection to a non-jury trial.

On May 11, 1992, Plaintiff moved the Court to compel production of documents, and after hearing, the Court denied the motion to compel, stating that the parties go outside and see if they can work out any disagreement between them. After outside discussion, it was requested that **HEMMERLE** explain the meaning of the documents that were produced at deposition, and if requested copy any documents sought by the Plaintiff. Plaintiff agreed to meet with **HEMMERLE** on Friday of that week, which was but three days prior to Calendar Call. Counsel arrived at **HEMMERLE'S** office at 5:15 PM, and handed him a list of the documents she wanted. **HEMMERLE** in the spirit of cooperation, spent some four hours sifting through the documents and

copying them for the Plaintiff, but was unable to provide counsel with the documents on that Friday since she had left without providing **HEMMERLE** with an address she could be reached on the weekend. **HEMMERLE** provided such documents prior to Calendar Call on the on Defendants' Motion for Clarification and Objection to a non-jury trial, that was denied by visiting judge **BOHANON**, counsel for Plaintiff **CYNTHIA A. REED, ESQ.**, without notice of hearing, made an ore tenus motion for a default and default judgment on the basis that the documents requested were delivered late and violated the order of Judge **A. JAY CRISTOL**. Visiting Judge the HONORABLE **RICHARD BOHANON** granted Plaintiff's Motion to Strike Defendants' pleadings and entered a Default and Default Judgment. See Transcript of Hearing (p. A. 28-29).

The Defendants filed a Notice of Appeal to the United States District Court for

the Southern District of Florida from the Bankruptcy Court's Order Striking Defendants Pleadings and entering a Default and Default Judgment.

Oral argument was held on August 13, 1993. On October 27, 1993, the District Court entered an ORDER AFFIRMING FINAL ORDERS AND FINAL JUDGMENT OF BANKRUPTCY COURT.

On November 1, 1993, Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit (p. A. 1-2, *infra*) from the Final Order Affirming Final Order and Final Judgment of the Bankruptcy Court (p. A. 6-16, *infra*). On March 8, 1994, Petitioners filed their Initial Brief to the Eleventh Circuit (p. A. 93-171, *infra*), alleging *inter alia* Six Points on Appeal, to wit: POINT I. DID THE BANKRUPTCY COURT ABUSE ITS DISCRETION IN ENTERING THE DEFAULT JUDGMENT, REQUESTED ORE TENUS, AND ENTERED IN VIOLATION OF RULE

55(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE? POINT II. DOES THE BANKRUPTCY COURT HAVE JURISDICTION TO SET ASIDE TRANSFER OF PROPERTIES WHEN SUCH TRANSFERS WERE MADE OVER A YEAR PRIOR TO THE TIME OF SUN'S FILING OF THE CHAPTER 11 PROCEEDING IN VIOLATION TO TITLE 11 § 547? POINT III. DOES THE CHAPTER 11 TRUSTEE HAVE AUTHORITY TO FILE AN ADVERSARY COMPLAINT AFTER A CONVERSION TO A CHAPTER 7 IN VIOLATION OF 11 USCS § 348(e)? POINT IV. DID THE BANKRUPTCY COURT ABUSE ITS DISCRETION BY ENTERING A DEFAULT JUDGMENT PURSUANT TO RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE ABSENT NOTICE AND HEARING PURSUANT TO RULE 55 OF THE FEDERAL RULES OF CIVIL PROCEDURE? POINT V. DID THE BANKRUPTCY COURT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANTS THEIR CONSTITUTIONAL RIGHT UNDER THE SEVENTH AMENDMENT TO THE CONSTITUTION BY DENYING A TRIAL BY JURY AS TO ISSUES SO

TRIABLE? POINT VI. DOES RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRE THAT AN ORDER HAS BEEN VIOLATED PRIOR TO THE IMPOSITION OF SANCTIONS BY ENTERING A DEFAULT AND DEFAULT JUDGMENT?

On May 2, 1994, Respondent/Appellee filed an Answer Brief (p. A. 172-204, *infra*) alleging *inter alia* that I. The Court properly granted Plaintiff's motion for sanctions, and entered default judgment against the Defendants, pursuant to Bankruptcy Rule 7037. II. The Bankruptcy Court does have jurisdiction to set aside fraudulent transfers pursuant to 11 U.S.C. § 548, and such actions are core proceedings. III. A Chapter 11 Trustee can be appointed Trustee after conversion to a Chapter 7 case, and as Chapter 7 Trustee, does have standing to bring avoidance action. IV. The Court was correct in determining that Defendants were not entitled to a jury trial.

On the 16th of May, 1994, Petitioners filed their Reply Brief (p. A. 229-271 *Infra*) alleging *inter alia* that: I. Bankruptcy Rule 7037 does not permit the court to grant Plaintiff's ore tenus motion for a default and default judgment where no order of the Court has been violated. II. The Bankruptcy Court is without jurisdiction to vacate or set aside transfers which were made over a year prior to the commencement of the bankruptcy proceeding, and, as such, cannot be a core proceeding. III. The Chapter 11 Trustee does not have authority to succeed himself after a conversion to Chapter 7 pursuant to 11 USCS § 348(e). IV. The Seventeenth Amendment to the United States Constitution provides for a trial by jury as to all issues at law.

On August 13, 1993, oral argument was made, and on December 21, 1994, the Eleventh Circuit affirmed, PER CURIAM,

without opinion the Order of the District Court affirming Final Orders and Final Judgment of the bankruptcy Court.

On December 28, 1994, Petitioners seeking rehearing and en banc consideration by the Eleventh Circuit set forth five significant issues, to wit:

I. Whether the United States Bankruptcy Court granting of Plaintiff's Default Judgment at Calendar Call, after announcing that Plaintiff was ready for trial, was error, and in violation of Rule 55(b)(2) of the Federal Rules of Civil Procedure, and a denial of due process.

II. Whether, Rule 37(b)(2) of the Federal Rules of Civil Procedure and/or Bankruptcy Rule 7037, can support the striking of Defendants' pleadings where no order has ever been disobeyed, nor does the record reflect the existence of any order which would show noncompliance of the Defendants/Appellants.

III. Whether the Bankruptcy Court was without jurisdiction over the parties, or the subject matter, to set aside transfers of properties that were transferred over a year prior to the filing of a proceeding in Bankruptcy.

IV. Whether the per curiam affirmance of the Bankruptcy Court, and the District Court for the Southern District of Florida, has the effect of total destruction of the

Defendants's vested property rights in violation of the Fifth Amendment of the United States Constitution.

V. Whether the denial of a jury trial in a non-core proceeding on legal issues, is a violation of the Seventeenth Amendment to the United States Constitution.

On February 24, 1995, the Eleventh Circuit Court PER CURIAM denied, again, without opinion, Petitioners' request for rehearing and the suggestion of Rehearing En Banc (p. A. 3-4, *infra*).

REASON FOR GRANTING THE WRIT

The United States Court of Appeal for the Eleventh Circuit by its per curiam affirmance without opinion has clearly shown a conflict with the decisions of its own court, the decisions of other United States Court of Appeals and the decisions of the United States Supreme Court. The Eleventh Circuit has departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by the lower

courts in permitting acts of larceny by the appointed Trustee.

The decision by the Eleventh Circuit is in derogation of the Fifth Amendment to the United States Constitution by permitting the theft of real property, and, as such, deprived the Petitioners of their property without due process of law.

The decision of the Eleventh Circuit is in derogation of the Seventh Amendment to the United States Constitution by denying the petitioners the right to a jury trial on legal issues.

The issues raised on appeal made a clear determination of the lower court's denial of due process, and a clear showing that by vacating the Quit Claim Deeds which only transferred a bare legal title, and not any equitable interest in the property, only restored the terms of the Conditional Trust Agreement. The lower court is permitting the

Trustee to sell the real property which is contrary to the terms of the Conditional Trust Agreement (A. 22-24). In view of the documents before the lower courts, to take and sell property of the Petitioners, is tantamount to permission of grand theft, all of which, not only violates the Fifth Amendment, but is contrary to the sound judicial interest, public access and confidence in the federal judiciary. The fundamental integrity of judicial proceedings before the bankruptcy court, the federal district court and the United States Eleventh Circuit Court of Appeal, should demand findings and well reasoned analysis before Petitioners' real property rights are not only disregarded, but Petitioners' real property is taken by the loss of right guaranteed by the Fifth Amendment, and the Seventh 'amendment's right to a trial by jury.

ARGUMENT

I.

THE ELEVENTH CIRCUIT COURT'S DECEMBER 21, 1994, PER CURIAM AFFIRMANCE IS TANTAMOUNT TO THE APPROVAL OF STRIKING PETITIONERS' PLEADINGS AND THE ENTRY OF A DEFAULT JUDGMENT AS A DISCOVERY SANCTION PURSUANT TO RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE, WHERE NO ORDER EXISTS THAT HAD BEEN DISOBEYED BY THE PETITIONERS.

Where sanctions are permitted pursuant to Rule 37 of the Federal Rules of Civil Procedure, or Rule 7037 of the Bankruptcy Rules, there must be an order which the party sanctioned failed to comply with. Nowhere in the record can there be found an order that was disobeyed.

In ***Susman v. Salem, Saxon and Nielsen, P.A.***, 154 F.R.D. 284 (M.D. Fla. 1994), the Court held: "Violation of a discovery order which is explained by a party's simple negligence, misunderstanding, or inability to comply will not justify a Rule 37 default judgment or dismissal." Citing ***In re: Chase***

and Sanborn Corp., 872 F.2d 397 (11th Cir. 1989); ***Equal Employment Opportunity Commission v. Troy State University***, 693 F.2d 1353, (11th Cir. 1982), *cert denied*, 463 U.S. 1207, 103 S.Ct. 3538, 77 L.Ed.2d 1388 (1983). The Court further stated "that severe sanction of dismissal or default judgment is to be used only as a last resort and when less drastic sanctions would not be able to ensure a party's compliance with the court's order." See ***Navarro v. Cohan***, 856 F.2d 141 (11th Cir. 1988). In the case ***sub judice***, the only reason for the striking of Petitioners' pleadings and the entry of a default judgment, was to take Petitioners real property for the use and benefit of the Trustee. Had the Petitioners been given notice that a motion for a default judgment was to be made, then they would have presented the Court with proof that at no time did they disobey a court order. The

record is devoid of any orders that would show that the Petitioners have failed to obey. The Calendar Call hearing shows that counsel for the trustee did in fact review all documents that was requested. She failed to have copied any of the requested documents. Petitioner, **HEMMERLE** made copies of the requested documents on May 15, 1992, and presented them to her on May 18, 1992. The transcript reveals that Ms. Reed was presented with such documents. At the hearing on May 18, 1992, she stated: "I was presented with what I can only describe as a car, a trolley looking thins, it is about half the size of this desk (indicating), about deep (indicating), your Honor, about two feet deep, packed in with documents that were just shoved in and they were in no discernible order." (p. A. 28-91).

In ***Pesaplastic, C.A. v. Cincinnati Milacron Co.***, 799 F.2d 1510 (11th Cir. 1986),

the Eleventh Circuit held:

> "It is well settled that the standard of review for an appellate court in considering an appeal of sanctions under Rule 37 is sharply limited to a search for abuse of discretion and a determination that the findings of the trial court are 'fully supported by the record.'"

In ***Aldolph Coors Company v. Movement against Racism***, 777 F.2d 1538 (11th Cir. 1985), the Court set forth certain precedents which would apply the case ***sub judice***. ***National Hockey League***, 427 U.S. 642, 96 S.Ct. at 1780-81; ***Carlucci v. Piper Aircraft***, 775 F.2d 1447 (11th Cir. 1985). Further holding that the decision to enter a default judgment ought to be the last resort- -order only if non compliance is due to willful or bad faith disregard of court orders. See, ***Societs International Pour Participations Industrielles et Commerciales, S.A. v. Rogers***, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed. 2d 1255 (1958); ***Equal Employment Opportunity Commission v. Troy State University***, 693 F.2d

1353 (11th Cir. 1982), *cert. denied*, 463 F.2d U.S. 1207, 103 S.Ct. 3538, 77 L.Ed.2d 1388 (1983); ***Morton v. Harris***, 628 F.2d 438 (5th Cir. 1980); ***Morton v. Schweiker***, 450 U.S. 1044, 101 S.Ct. 1766, 68 L.Ed.2d (1981). The Eleventh Circuit further stated that "On appeal we will also find an abuse of discretion if less draconian but equally effective sanctions were available. ***Aztic Steel Co. v. Florida Steel Corp.***, 691 F.2d 480-482 (11th Cir. 1982), *cert denied*, 460 U.S. 1040, 103 S.Ct. 1433, 75 L.Ed.2d 1118, 1126-27 (5th Cir.) *cert denied sub nom*, ***A.G. v. United States***, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970).

In ***Dean v. Ellington***, 115 F.R.D. 576-578, (USDC N.D. Georgia 1997), the Court held that dismissal of a complaint with prejudice is such a drastic remedy that a court should apply it only in extreme circumstances. ***Bon Air Hotel Inc. v. Time, Inc.***, 376 F.2d 118-

121 (5th Cir. 1967). Indeed, dismissal as a sanction should not be imposed if lesser sanctions will do. ***Hashemi v. Campaigner Publications, Inc.***, 737 F.2d 1538 (11th Cir. 1984).

In ***Securities and Exchange Commission v. Rehtorik***, 135 F.R.D., 204 (USDC S.D. Fla. 1991), holding that sanctions for failure to comply with discovery are permitted only after party has ignored court order compelling discovery and are not directly permitted for failure to comply with party's discovery request. Absent court order compelling securities fraud defendant to answer deposition questions, Securities and Exchange Commission was not entitled to a order precluding defendant from producing any evidence concerning disgorgement of fraudulently obtained monies.

Since no order exists to support the entry of a default judgment, then the case

law cited herein applies, and the per curiam affirmance of the Eleventh Circuit is in error.

ARGUMENT - II.

THE ELEVENTH CIRCUIT COURT'S AFFIRMANCE OF THE LOWER COURTS' DEFAULT JUDGMENT VIOLATED THE PROPERTY RIGHTS IN DEROGATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY DENYING DUE PROCESS, AND IS A DEPARTURE FROM THE ACCEPTED COURSE OF JUDICIAL REVIEW, AND CONFLICTED WITH ITS OWN OPINIONS AND THE OPINIONS OF OTHER CIRCUIT COURTS AND THE OPINIONS OF THIS COURT.

In the recent case of ***United States v. Good Real Property***, 114 S.Ct. 492, 126 L.Ed. 490 (1993), this court reaffirmed the fundamental right of private property, and stated:

> "Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance." Citing, ***United States v. Karo***, 468 U.S. 705 (1984) 104 S.Ct. 3296, 82 L.Ed. 530; ***Payton v. New York***, 445 u.s. 575, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).
>
> "Individual freedom finds tangible

> expression in property rights." "Respect for the sanctity of the home . has been embedded in our traditions since the origin of the Republic, Citing, ***Entick v. Carrington***, 19 How, St. Tr. 1029, 1066 (C.P. 1765," indeed, "the great end for which men entered into society, was to secure their property."

If fundamental right of real property ownership is to truly remain inviolate, the Eleventh Circuit had a duty to reverse the lower courts, or, in the alternative, show why due process is not afforded to the Petitioners.

ARGUMENT - III.

THE ELEVENTH CIRCUIT COURT'S AFFIRMANCE OF THE DENIAL OF JURY TRIAL, TIMELY DEMANDED BY PETITIONERS IN A NON-CORE PROCEEDING, VIOLATED THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The clear mandate as adopted from Rule 38 of the Federal Rules of Civil Procedure and the Interim Rule 9001 of the Bankruptcy Rules, governs all requests jury trials.

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and for fact tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

After proper demand was made regarding Petitioners' right to a jury trial, the bankruptcy court denied this right guaranteed by the Constitution, such denial was antagonistic and contrary to the Supreme Court's decision in ***Granfinanciera, S.A. v. Nordberg***, 492 U.S. 33, 109 S.Ct. 2782m 106 L.Ed.2d (1989).

The Trustee's response in it's Answer Brief to Petitioners' argument regarding the bankruptcy court's denial of a jury trial, it was stated, viz:

> "The request for jury trial was untimely, and was not brought to the attention of the Court until the filing of the motion for clarification and objection to non-jury trial on May 12, 1992, only one week before trial.

The trustee failed to mention that the demand for jury trial was made at the time of

Petitioners' Answer, and, as such, was timely. Petitioners' further stated in their Unilateral Pre-Trial Stipulation that the issues would be tried by jury. The motion for clarification was made after the trustee failed to provide Petitioners with the notice of the pretrial conference, and Petitioners found that this conference was had without their presence.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE: SUN-ISLAND REALTY, INC.,

Debtor

_____/

KENNETH V. HEMMERLE, SR.,
S.I.R. INVESTMENT AND
DEVELOPMENT INC., and
KING OF CLUBS, INC.,

Appellants-Defendants,

-VS-

CASE NO. 92-6935
CIV-ARONOVITZ

DANIEL L. BAKST, Trustee,

Appellee-Plaintiff.

_____/

NOTICE OF APPEAL

Notice is hereby given that **KENNETH V. HEMMERLE, SR., S.I.R. INVESTMENT AND DEVELOPMENT, INC.**, and **KING OF CLUBS, INC.**, Appellants-Defendants above named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Final Order Affirming Final Order and Final Judgment of the Bankruptcy Court to wit: Final Orders and Final Judgment entered by Judges **A. J. Cristol** and **Richard**

Bohanon of the United States Bankruptcy Court for the Southern District of Florida, viz: (1) Order Granting Plaintiff's Motion for Sanctions and Entering Default Against the Defendants, dated May 19, 1992; (2) Final Judgment for Plaintiff after Default, dated May 19, 1992; (3) Order Denying As Moot Defendants' Motion for Clarification and Objection to Non-jury Trial, dated May 20, 1992, and (4) Order Dismissing Counterclaims, dated April 24, 1992. The District Court's Order Affirming was entered in this action on the 27th day of October, 1993.

/s/ K.V. Hemmerle,Sr.
KENNETH V. HEMMERLE SR
808 Northeast Third Avenue,
Fort Lauderdale, FL 33304

/s/ A. M. Siegel
ALEXANDER M. SIEGEL, ESQ
3111 North Andrews Avenue
Fort Lauderdale, FL 33309
Attorney for S.I.R. INV. & DEV. and KING OF CLUBS, INC.
Fla. Bar. No. 135605

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-5206

IN RE: SUN ISLAND REALTY, INC.,

KENNETH V. HEMMERLE, SR.,
S.I.R. INVESTMENT & DEVELOPMENT, INCORPORATED,
KING OF CLUBS, INC.

Plaintiff-Appellants,

versus

SUN ISLAND REALTY, INC.,
DANIEL L. BAKST, Trustee,

Defendants-Appellees,

A. JAY CRISTOL, Bankruptcy Judge

Respondent.

- - - - - - - - - - - - - - - - -

On Appeal from the United States District Court
for the Southern District of Florida

- - - - - - - - - - - - - - - - -

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: **HATCHETT** and **ANDERSON**, Circuit Judges, and **FAY**, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are **DENIED** and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing

en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5, the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ Jack D. Hatchett
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

FILED FEB 24 1995

FILED: DEC 21

A-5

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-5206

D. C. Docket Nos. 92-6935-CIV-SMA
91-0658-BKC-AJC-A

IN RE: SUN ISLAND REALTY, INC.,

Debtor.

KENNETH V. HEMMERLE, SR., S.I.R. INVESTMENT & DEVELOPMENT, INCORPORATED, KING OF CLUBS, INC.,

Plaintiffs-Appellants,

versus

SUN ISLAND REALTY, INC., DANIEL L. BAKST, Trustee,

Defendants-Appellees,

A. JAY CRISTOL, Bankruptcy Judge,

Respondent.

Appeal from the United States District Court
For the Southern District of Florida

(December 21, 1994)

Before **HATCHETT** and **ANDERSON**, Circuit Judges, and **FAY**, Senior Circuit Judge.

PER CURIAM:
Affirmed.

ISSUED AS MANDATE:
MAR 14 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-6935-CIV-ARONOVITZ

IN RE: SUN ISLAND REALTY, INC.,

Debtor

_____/

KENNETH V. HEMMERLE, SR., S.I.R. INVESTMENT AND DEVELOPMENT, INC., and KING OF CLUBS, INC.,

Appellants,

vs.

DANIEL L. BAKST, TRUSTEE,

Appellee.

_____/

ORDER AFFIRMING FINAL ORDERS AND FINAL JUDGMENT OF BANKRUPTCY COURT

This is an appeal of three (3) final orders and a final judgment entered by Judges A.J. Cristol and **RICHARD BOHANON** of the United States Bankruptcy Court for the Southern District of Florida. The orders on appeal are: (1) Order Granting Plaintiff's Motion for Sanctions and Entering Default Against the Defendants, dated May 19, 1992; (2) Final Judgment for Plaintiff After

Default, dated May 19, 1992; (3) Order Denying As Moot Defendants' Motion For Clarification and Objection to Non-Jury Trial, dated May 20, 1992, and (4) Order Dismissing counterclaims, dated April 24, 1992. The Court has considered the briefs on appeal, argument of counsel, the entire record, and the applicable law, and is otherwise fully advised in the premises. For the following reasons, the foregoing orders and final judgment on appeal are hereby AFFIRMED.

Factual and Procedural Background

On September 26, 1990, Debtor Sun-Island Realty, Inc., filed for Chapter 11. Thereafter, Appellee Daniel L. Bakst ("Trustee") was appointed trustee. Subsequently, the case was converted to Chapter 7 and the Trustee continued in his capacity by bankruptcy court order. Appellant Kenneth V. Hemmerle, sr., ("Hemmerle") is an insider of the Debtor. TR at 3. Appellants S.I.R. Investments and Development,

Inc., and King of Clubs, Inc. are corporations controlled by Hemmerle.

On July 26, 1991, the Trustee filed an adversary complaint seeking to set aside eight (8) allegedly fraudulent transfers of real estate made by the Debtor to Hemmerle pursuant to 11 U.S.C. §548. Appellants' motions to dismiss the adversary complaint were denied by the Bankruptcy Court on October 4, 1991, ant this ruling was never appealed. Despite being ordered to file a response to the adversary complaint, and the subsequent entry of a clerk's default which was later vacated, Appellants finally filed their answer, affirmative defenses, and counter-claims on February 3, 1992. On April 24, 1992, the bankruptcy court entered an Order Dismissing Counterclaims. Said order did so without prejudice. This order is on appeal and listed in Appellants' Notice of Appeal dated May 28, 1992.

(i) ***The discovery matters***

It is the matter of Appellants' conduct

relating to discovery which gives rise to the appeal. On June 18, 1992, the bankruptcy court entered an Order, nunc pro tunc, on Plaintiff's Motion to Compel Production of Documents And/or For Contempt which pertained to the bankruptcy court's oral ruling made on May 11, 1992. Said order states that prior requests for production had been made upon Appellants. Moreover, said order ordered that Appellants produce the requested documents on or before May 15 at 5:00 p.m. The documents sought had been the subject of a February 1992 motion for sanctions upon which Judge Cristol had deferred ruling.

Upon the Appellee's ore tenus motion for sanctions at the bankruptcy court's May 18, 1992 calendar call, the bankruptcy court heard testimony as to whether Appellants had complied with the May 11 order. The bankruptcy court heard from Appellee's counsel and Appellant Hemmerle. The bankruptcy court found Appellee's

counsel the more credible witness. TR at p.54. The bankruptcy court found that the Appellants did not act in good faith compliance with the discovery orders. Further, the bankruptcy court found that striking of Appellants' answer and the entry of a default were the appropriate sanctions under Fed. R.Civ.P. 37. TR at 55 and Order Granting Plaintiff' Motion For Sanctions And Entering Default Against the Defendants.

Contemporaneous with the entry of the order granting sanctions and default, the bankruptcy court entered a final judgment which found the transfers of the eight parcels of real estate were fraudulent and set aside the transfer of same. See Final Judgment For Plaintiff After Default.

(ii) ***Appellants' demand for jury trial***

A trial on the adversary complaint was scheduled for May 18, 1992. On May 12, 1992, Appellants filed a Motion for Clarification and Objection to Non-Jury Trial. Appellants had

demanded a jury trial on those issues triable to a jury. See Defendants' Answer at p. 15. The bankruptcy court denied the motion on May 20, 1992.

DISCUSSION

(i) ***Standard of Review***

Factual findings of a bankruptcy court are subject to a "clearly erroneous" standard of review. Federal Bankruptcy Rule of Procedure 8013. A bankruptcy court's conclusions of law are subject to de novo review. The Supreme Court and the Eleventh Circuit have held that when the imposition of sanctions are involved, that same is reviewable under an abuse of discretion standard of review. ***National Hockey League v. Metropolitan Hockey Club***, 427 U.S.639, 642, 96 S.Ct. 2780, 49 L.Ed.2d 747 (1976); ***Jaffe v. Grant***, 795 F.2d 1182 (11th Cir. 1986, rehearing denied 803 F.2d 1185, *cert. denied* 107 S.Ct. 1566, 480 U.S. 931, 94 L.Ed.2d 759.

(ii) **Entry of Default, and Entry of Final Judgment After Default for violations of discovery**

On appeal this court must determine if the bankruptcy court abused its discretion when it entered default against Appellants and entered final judgment. Bankruptcy Rule 7017 incorporated Fed.R.Civ.P. 37 which permits a court to enter default and/or strike the pleadings of a disobedient party. In this matter, the record reveal that Appellants had been warned and placed on notice by the bankruptcy court on several occasions that they must comply with Appellee's discovery requests. At the May 18, 1992, trial date, the bankruptcy court received testimony which revealed that the oral May 11, 1992, order compelling production of documents had not been complied with by Appellants. Simply, the bankruptcy court found Appellee's counsel testimony more credible at the May 18 hearing. In this instance, where

the bankruptcy court found that Appellant "intentionally, repeatedly, and without excuse disobeyed" the bankruptcy court's orders regarding production of documents to Appellees, the bankruptcy court did not abuse its discretion in entering default and entering final default judgment. See Order Granting Plaintiff's Motion for Sanctions And Entering Default Against The Defendants; and ***Duchanan v. Bowman***, 820 F.2d 359 (11th Cir. 1987). Notwithstanding the foregoing, Appellants do very little to cast doubt on whether the bankruptcy court abused its discretion.

(iii) **The Order Striking Defendants' Counterclaims**

In light of the foregoing discussion, the Court need not address Appellants' appeal of the bankruptcy court's April 24, 1992 Order Dismissing Defendants' Counterclaims. Aside from the fact that said Order is as one of the orders

on appeal, Appellants' brief fails to address whatever challenges it had to said Order Dismissing counterclaim, the previous discussion render any issue relating to the dismissal of Appellant's counterclaims as moot.

(iv) **Appellants' Demand for Jury Trial**

Appellants' claim that they were entitled to a jury trial is misplaced as the court finds no error. The ***Granfinanceria, S.A. v. Nordberg,*** 109 S.Ct. 2782 (1989) decision held that a party who has not submitted a claim against a bankrupt estate is entitled to a trial by jury when sued by the trustee in bankruptcy to recovery an alleged fraudulent monetary transfer. The focus of inquiry in the foregoing limited scenario is the nature of the relief sought; equitable versus legal. Since the Trustee's complaint was seeking to set aside an alleged fraudulent transfer of real estate, the relief sought would be deemed equitable. Therefore, notwithstanding the fact that Appellants' had not filed any claims against

the estate, the bankruptcy court correctly denied 'Appellants' request for jury trial. See ***In re Stocks***, 137 B.R. 516 (Bankr. N.D. Fla. 1991)(Defendant not entitled to jury trial even though defendant did not file proof of claim where action was equitable requesting declaration that interest in partnership was property of bankrupt estate.) Accordingly, there was no error in denying Appellants' demand for trial by jury.

Conclusion

For the reasons set forth herein, it is

ORDERED AND ADJUDGED that:

(1) The bankruptcy court's May 19, 1992 Order Granting Plaintiff's Motion for Sanctions and Entering Default Against the Defendants is **AFFIRMED**.

(2) The bankruptcy court's May 19, 1992 Final Judgment for Plaintiff After Default is **AFFIRMED**.

(3) The bankruptcy court's May 19, 1992 Order

Denying Defendants' Motion For Clarification and Objection To Non-Jury Trial is **AFFIRMED**.

(4) The bankruptcy court's April 24, 1992 Order Dismissing Counterclaims is **AFFIRMED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 27 day of October, 1993.

/s/ Sidney M. Aronovitz
UNITED STATES DISTRICT JUDGE

copies provided:
Leslie Cloyd, Esq.
Kenneth V. Hemmerle, Sr.
Jan Michael Morris, Esq.
Clerk, U.S. Bankruptcy Court
Trustee

IN THE UNITED STATES BANKRUPTCY COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA.

In The Matter Of: **CASE NO. 90-26885-BKC-AJC**

SUN-ISLAND REALTY, INC.

Debtor

_____/

DANIEL L. BAKST, TRUSTEE,

Plaintiff,

vs.

KENNETH V. HEMMERLE, SR., S.I.R. INVESTMENT & DEVELOPMENT, INC., and KING OF CLUBS, INC.,

Defendants.

_____/

FINAL JUDGMENT FOR PLAINTIFF AFTER DEFAULT

THIS CAUSE came before the Court after default was duly entered against each of the defendants in open court in Miami on May 18, 1992. Based upon said defaults, and it appearing that plaintiff is entitled to entry of final judgment against the defendants, it is hereby

ORDERED AND ADJUDGED that the Quit Claim Deeds

transferring eight different parcels of real property from the debtor to S.I.R. INVESTMENT AND DEVELOPMENT, INC. and to KING OF CLUBS, INC. are hereby declared fraudulent under 11 U.S.C., §544 and said conveyances are hereby set aside, and the title to each parcel of said real property is hereby transferred to plaintiff, DANIEL L. BAKST, as Trustee of SUN-ISLAND REALTY, INC., Debtor. The Quit Claim Deeds which are so set aside are attached hereto as Composite Exhibit "A" to this Final Judgment; the legal descriptions of the properties which are hereby transferred to Daniel L. Bakst, as Trustee of SUN-ISLAND REALTY, INC., Debtor are listed below:

A. Lots 18, 19, 20, and 21, Block 7, CORAL RIDGE COMMERCIAL BOULEVARD ADDITION, as recorded in Plat Book 43, Page 13, of the Public Records of Broward County, Florida;

B. The "Buster" Part of the S.W. 1/4 of Section 14-49-42; Parcel "A" less West 389 feet, as recorded in Plat Book 122, Page 2, of the Public Records of Broward County, Florida, situate, lying, and being in the City of Oakland Park, Florida;

C. Lots 13, 14, 15, and 16 in Block 19, OCEAN AVENUE HEIGHTS, according to the Plat thereof, recorded in Plat Book 11, Page 3, Public Records of Broward County, Florida, situate and lying in the City of Oakland Park, Florida;

D. Lots 12, 13, 14, 15, 16, 17, 18, 19, and 20 less West 10 feet for street, Block 255, PROGRESSO 2-18D, Public Records of Dade County, Florida, all of said lands situate, lying, and being in the City of Fort Lauderdale, Broward County, Florida.

E. Lots 37, 38, 39, 40, 41, 42, and 43, Block 313, lying West of Federal Highway, and Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, Block 314, PROGRESSO, according to the Plat thereof, recorded in Plat Book 2, Page 18, of the Public Records of Dade County, Florida, situate and lying in the City of Fort Lauderdale, Broward County, Florida.

F. Tract "A" and 40.00 Foot Canel Row, TAMARAC MARKET PLACE, as recorded in Plat Book 118, Page 20, of the Public Records of Broward County, Florida.

F. Tract "E" BOCA POINTE NO. 4, Part of a P.U.D., recorded in Plat Book 43, Pages 194, 195, and 196 of the Public Records of Palm Beach County, Florida and lying Section 34, Township 47, South Range 42 East, Palm Beach County, Florida.

G. Lost 1 and 2, Block 6, LAKE ADDITION TO BOYNTON, FLORIDA, Boynton Beach, Palm Beach county, Florida, as recorded in Plat Book 11, Page 71, of the Public Records of Palm Beach County, Florida.

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to 11 U.S.C. §542, each of the defendants shall, at his or her own expense, each serve an accounting upon the plaintiff of all rental income collected or received by any or all of them between September 1989 and the date of this Judgment from any tenant or occupant of any or the properties enumerated above, and shall present said accounting to plaintiff within 30 days of this Judgment. Within 30 days after serving their accountings upon the plaintiff, each of the defendants shall turn over to the plaintiff all said rental income, which shall be received by the Trustee as property of the estate. The defendants shall cease all further collection of rents from the eight subject properties.

The Court reserves jurisdiction to enter further orders to enforce this Judgment.

DONE AND ORDERED in said District on this 19 day of May, 1992.

/s/Richard L. Bohanon
RICHARD L. BOHANON
U.S. BANKRUPTCY JUDGE

Copies Furnished:

Cynthia A. Reed, Esquire
Post Office Drawer 3948
West Palm Beach, FL 33402

Kenneth V. Hemmerle, Sr.
808 N.E. 3rd Avenue
Fort Lauderdale, Florida 33304

Richard Doggett, Esquire
808 N.E. 3rd Avenue
Fort Lauderdale, Florida 33304

CONDITIONAL TRUST AGREEMENT

THIS AGREEMENT OF TRUST made and entered into this 16th day of May, 1980, by **KENNETH V. HEMMERLE, SR.** hereinafter referred to as Trustor or Settlor, and **SUN-ISLAND REALTY, INC.**, hereinafter referred as Trustee.

WITNESSETH, Trustor irrevocably grants, transfers and assigns to Trustee in trust, without the power to sell, all real property now held in his name or the name of any corporate vehicles for a period of time to be determined at a future date. Trustor further grants Trustee all title interest in real property acquired at any time when Trustee may be exposed to an obligation resulting from any acts or omissions of the Trustor or his assigns.

Trustee is a registered real estate broker in the State of Florida, and Trustor has agreed to retain Trustee as an exclusive broker for all sales and leases of any real estate located in the State of Florida. It is further agreed that should Trustee obtain a real estate brokers license in any other state which Trustor is conducting business, the,, Trustee will be the exclusive broker of such sales or leases in any state where it is licensed.

Trustee has agreed to assist Trustor or any of his corporate vehicle in obtaining financing for the construction and development of any real property, and Trustee will guarantee all indebtedness and be secondarily liable for the payment of any construction or development loans.

Trustor by the conveyance in trust of all real property has agreed that should Trustee become liable for any indebtedness which Trustee has guaranteed, then Trustor will agree to have sold

any and all real property to a third party in which to satisfy the liability remaining after a foreclosure sale of the improved property which Trustee was secondarily liable.

The Trustee is hereof restrained from anticipating, assigning, transferring, selling, or otherwise disposing of any interest it holds in trust, of which the equitable interest is held in the Trustor and or his assigns. No such anticipation, assignment, transfer, sale, or other disposition shall be concluded if their remains an obligation that the Trustee may be liable for. No interest shall pass of any right or title, of any nature or kind to any other, until this trust agreement is concluded, and agreed upon by both parties.

No party to this agreement shall assign, transfer, convey, anticipate, pledge, hypothecate, or otherwise encumber any interest hereunder, and the Trustee shall not be liable for any debt of the Trustor that he has not agreed in writing to such liability, or be subject to any claims of creditors, any judgment rendered against the Trustor, or any other process of court in aid of execution of any judgment rendered against the Trustor. All income under this trust shall be transferred, paid and delivered to the Trustor at the times and pursuant to the terms of this trust and contract on property related to but not part of this trust. A personal written receipt of the Trustor shall, at the option of the Trustee be a condition precedent to any payment by Trustee to Trustor.

IN WITNESS WHEREOF, SUN-ISLAND REALTY, INC. has caused these presents to be duly signed by its President, thereunto authorized by resolution of its board of directors and has caused it

corporate seal to be hereunto affixed on this 16th day of May, 1990.

SUN-ISLAND REALTY, INC.

/s/ Eugene Dages
Witness

By s/s Maria T. Popejoy
MARIA T. POPEJOY (Pres.)

IN WITNESS WHEREOF, KENNETH V. HEMMERLE, SR., as TRUSTOR, has executed these presents on this 16th day of May, 1980.

/s/ Eugene Dages
Witness

/s/Kenneth v. Hemmerle, Sr.
KENNETH V. HEMMERLE, SR.

MINUTES OF SPECIAL MEETING OF DIRECTORS SUN-ISLAND REALTY, INC.

A special meeting of the Board of Directors of the corporation was held on September 19, 1989, at 808 Northeast Third Avenue, Fort Lauderdale, Florida.

All of the Directors being present, the meeting was called to order the Chairperson, MARIA T. POPEJOY. The Chairperson advised that the meeting was called for the sole purpose of satisfying the obligations of corporation created by past Chairman KENNETH V. HEMMERLE, SR. regarding loans, guarantees and as trustee of real property as eo nomine.

The Chairperson advised the Board that the corporation was obligated in the amount of $3,000,000.00 for the mortgage on Parcel "E" of Boca Pointe; obligated in the amount of $1,000,000.00 on the various parcels; obligated in the amount of $3,700,000.00 on the Sun-Island Plaza; obligated for $8,192,500.00 on parcel "F-1" of Boca Pointe, for a total obligation on properties held in trust in an amount of $15,892,500.

The Chairperson advised the Board that the corporation has expanded the sum of $1,886,000.00 as a loan to Acquisition Corp. of America on the "Costa Del Sol" project. Acquisition agreed to pay 2% over prime as interest on all monies advanced on behalf the "Costa Del Sol" project.

The Chairperson advised the Board that corporation that on the 14th of September, 1989, a jury verdict was returned in favor the corporation in the amount of $1,900,000 in Case No 88-818 (AA) in the Circuit Court of Palm Beach county, Florida. The Chairperson further advised the corporation that a jury verdict was returned in favor of KENNETH V. HEMMERLE, SR. in the amount of $25 million dollars.

After a careful analysis, the Board with the assistance of KENNETH V. HEMMERLE, SR., was able to calculate, after credits and debits an amount due and owing on the obligations of the real property held by the corporation as eo nomine the sum of $14,168,000.00

KENNETH V. HEMMERLE, SR., agreed to assign the amount of $14,168,000 of his final judgment to hold harmless the corporation of any obligations created by real properties held as eo nomine.

It was further advised by the Chairperson, and accepted by the Board that an assignment of the $14,168,000.00 by KENNETH V. HEMMERLE, SR. would transfer all properties by Quit Claim Deed to KENNETH V. HEMMERLE, SR. or his corporate vehicle upon the instructions given by KENNETH V. HEMMERLE, SR.

RESOLVED, that the corporation will accept the $14,168,000.00 assignment of judgment, and following payment by the debtor will caused to be satisfied all such obligations as advised by the Chairperson.

RESOLVED, that upon receipt of the assignment for KENNETH V. HEMMERLE, SR., in the amount of $14,168,000.00, the corporation will transfer by Quit Claim Deed, all properties held as eo nomine to whatever entity suggested by KENNETH V. HEMMERLE, SR.

RESOLVED, that such assignment and Deed will be executed by the corporation within one (1) day following the entry of the Judgment by the Court.

RESOLVED, that the assignment will be executed simultaneously by KENNETH V. HEMMERLE, SR. with the execution by the corporation of the Quit Claim Deeds.

RESOLVED, that is exchange with the execution of the Quit Claim Deeds, KENNETH V. HEMMERLE, SR. will further agree to hold harmless the corporation from any and all obligations arising from or connected with the properties held as eo nomine, and such hold harmless agreement will be by separate instrument executed by Assignor prior to the delivery of the Quit Claim Deeds.

RESOLVED, that in return for past obligations by the corporation in connection with the properties held as eo nomine, and the financial strength given to each of such properties, it has been agreed by the Assignor in exchange for such assistance the corporation will be given exclusive sale agreement in connection with any and all matters of sale regard the properties.

Mrs. Sheridan moves that the meeting has ended, Mr. Hemmerle seconds the motion.

There being no further business before the meeting, on motion duly made, seconded and carried, the meeting was adjourned.

Dated, September 19, 1989.

/s/ Maria T. Popejoy
Chairperson

/s/ Kenneth V. Hemmerle, Sr.
Secretary

UNITED STATED BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
JUDGE RICHARD BOHANON

In the Matter of:

SUN ISLAND REALTY, INC.
Debtor' Case No. 90-26995-BKC-AJC
_____x

TRIAL

May 18, 1992

The above-entitled cause came on for hearing before the HONORABLE RICHARD BOHANON, one of the Judges of the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, as 51 Southwest 1st Avenue, Miami, Dade County, Florida on Monday, Mary 18, 1992, commencing at or about 9:30 a.m., and the following proceedings were had:

REPORTED BY: Cheryl L. Kriel

APPEARANCES:

ACKERMAN, BAKST, CLOYD & SCHERER, by
CYNTHIA REED, Esquire
on behalf of the Trustee

RICHARD GERALD DOGGETT, Esquire
on behalf of the corporate Defendants

KENNETH HEMMERLE,
pro se

-- - --

THE COURT: Bakst versus Hemmerle, which is in the Sun Island case.

MS. REED: Good morning, your Honor, Cynthia Reed on behalf of Daniel L. Bakst, Trustee, and plaintiff in this adversary case.

MR. DOGGETT: Richard Doggett for the corporate defendant, your Honor, and Mr. Kenneth Hemmerle, pro se, as the defendant.

THE COURT: What's the corporate - - -

MR. HEMMERLE: S.I.R. Development.

THE COURT: Who?

MR. HEMMERLE: S.I.R. Development.

THE COURT: S.I.R.?

MR. HEMMERLE: Yes, sir.

THE COURT: S.I.R. Development.

MR. HEMMERLE: Investment and Development, Inc. and King of Clubs, Inc.

THE COURT: That is who you represent?

MR. HEMMERLE: Yes, sir.

THE COURT: All right, and then, Mr. Hemmerle,

you are representing yourself?

MR. HEMMERLE: Yes, sir.

THE COURT: Are you an insider of S.I.R. and King of Clubs? Are you involved with those?

MR. HEMMERLE: I am, yes, I am, your Honor.

THE COURT: Okay, and you have sued under 548, right?

MS. REED: We have sued to set aside fraudulent conveyances, your Honor, eight parcels of real property - -

THE COURT: Okay.

MS. REED: - - as well as the rents collected from those parcels.

THE COURT: How long do you think this trial and your evidence will take?

MS. REED: I think that we could be finished in tow hours.

THE COURT: How about yours?

MR. DOGGETT: Your Honor, I think it is going to take three days. We have 11 witnesses, plus rebuttal and impeachment witnesses, as well as if

we start a jury trial in the regard, it is going to take us a day just to select a jury, I believe.

THE COURT: Well, is S.I.R. Development and King of Clubs, are they creditors?

MR. DOGGETT: No, they are not, your Honor.

MS. REED: Your Honor, I think you'll find out that in this adversary proceeding all three of the defendants filed counterclaims against the trustee - -

THE COURT: Oh, okay.

MS. REED: - - therefore, have subjected themselves to the jurisdiction of the Court.

THE COURT: Under the Granfinenciera case.

MR. DOGGETT: The Court believes, as your Honor, that the Trial Court - - I mean, Judge Cristol dismissed that counterclaim without prejudice to be refiled at a later date. The fact of the matter is the crux of the initial claim is the only thing that remains pending, and

it is not against the creditor of the estate.

THE COURT: Okay, we will come back to that. So, you don't have - - how many witnesses do you contemplate?

MS. REED: Well, your Honor, no more than three, I wouldn't imagine, and that would not include any of the rebuttal witnesses which were may have to call. I need to point out that, in my opinion, Judge, the issues that are raised, for the most part, by the defense in their unilateral pre-trial stipulation were not properly raised in their answers and, therefore, would not be subject to trial before the Court. They were issues that should have been raised in the affirmative defenses, which were not.

THE COURT: What type of issues?

MS. REED: Issues, I can't even describe, relating to whether the debtor, Sun Island Realty, ever was really the owner of the property, notwithstanding the fact that the property was titled in the name of Sun Island.

THE COURT: Wait a minute, Sun - - oh, That's the debtor, okay.

MS. REED: That's the debtor, Judge. Notwithstanding that the property was deeded, the deed was held by Sun Island Realty, Inc. in its own corporate capacity and not in any representative capacity, and the quit claim deed provided that the fraudulent conveyance took place also by Sun Island Realty, grantor, rather than Sun Island as some kind of - -

THE COURT: That door is not locked, is it?

UNIDENTIFIED: It is still locked, your Honor.

THE COURT: Can you unlock that, Mr. Diener?

MR. DIENER: I will try, your Honor.

MS. REED: Shall I continue?

THE COURT: Okay. I will come back to this. We need to sort some of those things out.

MS. REED: Yes, Judge.

(Thereupon, other matters on the calendar were called, after which the following proceedings were had:)

MR. DOGGETT: Your Honor, Richard Doggett on the Bakst case.

THE COURT: Which?

MR. DOGGETT: On the Bakst case, B-a-l-s-t. Mr. Hemmerle and I have a calendar call in the Federal Court about ten blocks away at 10 o'
clock. Is it possible to be excused or you could rule ---

THE COURT: Who has what?

MR. DOGGETT: Mr. Hemmerle and I, the two defendants, have a Federal calendar call as 10:00, sir.

THE COURT: All right, just be seated and I will come back to you in a moment.

MR. DOGGETT: Thank you, sir.

(Thereupon, other matters on the calendar were called, after which the following proceedings were had:)

THE COURT: All right, Now, Ms. Reed, on this Bakst versus Hemmerle, my docket only shows Bakst

versus Hemmerle, but these corporation are also -

MS. REED: Yes, Judge.

THE COURT: You are suing them, too?

MS. REED: Yes, the correct style of the case includes three defendants, Kenneth Hemmerle, individually, S.I.R. Investment and Development, Inc., and King of Clubs, Inc., both of which are two corporation in which - - -

THE COURT: And the debtor, again, is who?

MS. REED: Sun Island Realty, Inc.

THE COURT: Sun Island. Now, I didn't receive any pre-trial materials on this.

MS. REED: I Federal Expressed my materials. your Honor, for delivery on the morning of May 13th.

MR. DOGGETT: Your Honor, I faxed to your office - - -

THE COURT: Oh, I'm sorry, I did. I got the defendant's stipulation only, and your stipulation and statement. Well, how about if we

just reach this this afternoon?

MS. REED: That's fine with me, your Honor.

THE COURT: 1:30?

MS. REED: 1:30, very good, Judge.

THE COURT: All right. Well, wait a minute, we may be able to get to it before then. I just can's be sure of these other cases.

)Thereupon, other matters on the calendar were called, after which the following proceedings were had:)

THE COURT: Well, how long will your calendar call in the District Court take?

MR. DOGGETT: Your Honor, it shouldn't take more than an hour, perhaps half an hour.

THE COURT: All right. Well, why don't you just - - why don't we just pass this up to about 11:00?

MS. REED: Very good, Judge. Thank you. May I be excuse, your Honor?

THE COURT: Yes. Come back at 11:00, and hopefully by then we will either be able to reach

it or give you a more definite time.

MS. REED: Thank you, your Honor.

(Thereupon, other matters on the calendar were called, after which the following proceedings were had:)

THE COURT: Yes.

MS. REED: Your Honor, Cynthia Reed.

THE COURT: You are Miss - - -

MS. REED: I am Cynthia Reed, your Honor.

THE COURT: Reed, on the - - -

MS. REED: The Bakst as Trustee.

THE COURT: Right.

MS. REED: This is the Hemmerle, et al adversary.

THE COURT: Right, and they were due back here at 11:00.

MS. REED: Yes, they were, your Honor, and I believe the Judge's name, the Federal District Judge's name that they mentioned was a Judge Hightower. They represented to the Court that

their docket call began at 10:00. The Court that they were referring to is within walking distance of this one. I can't imagine that a docket call will take over an hour-and-and-a-half. I have been here since 11:00 myself. Your Honor, what I would like to do is phone Judge Hightower's office and ask his office whether the docket call lasted this long or, number two, whether Mr. Hemmerle and Mr. Doggett were before the Court.

THE COURT: All right. Would you do that?

MS. REED: Yes, I will, your Honor.

(Thereupon, other matters on the calendar were called, after which the following proceedings were had:)

THE COURT: Now, back on the sun Island case.

MR. HATCH: Your Honor, I hate to interrupt, but may we be excused?

THE COURT: Yes, sir, until 1:30.

MR. HATCH: Thank you.

THE COURT: Ms. Reed, okay, you seek to recover

transfers of what, real estate?

MS. REED: Yes, your Honor. Eight real property parcels, real property located in two counties down here, Palm Beach county, which is where West Palm Beach is located and Broward County, which is where Fort Lauderdale is located.

THE COURT: Be seated. Eight pieces of property.

MS. REED: That's correct, Judge.

THE COURT: Now, the defendants say that they have made a demand for a jury trial.

MS. REED: Yes, they do say that. Your Honor, if I may also add, that in addition to seeking to set aside the fraudulent conveyances of those parcels of real property, the trustee is also seek an accounting and a turnover of the property of the estate from the defendants relating to any monies that they have received from these properties.

THE COURT: Which would also be under

Granfinanciers, a jury issue that everything else is, that it is ripe.

MS. REED: Your Honor, I don't believe that any of the issues are jury trial issues under Granfinanciera and I will explain why.

THE COURT: All right.

MS. REED: I think it is very easily distinguishable, the holding in Granfinanciera was a fairly narrow holding and is distinguishable from this case.

THE COURT: Well, it is true it is narrow.

MS. REED: In Granfinanciera, your Honor, and for the court reporter's benefit, that citation 109 Supreme court Reporter 2782, which is a United States Supreme Court case decided in 1989, involved an action that a trustee had brought against entities which had not made any claims in the bankruptcy estate - -

THE COURT: Which I am told is - - -

MS. REED: - - and, in addition, your Honor,

what the trustee's action was was to set aside a fraudulent conveyance of money, specific money, rather than real property, and the Supreme Court in that case held - - -

THE COURT: Well, are you here seeking money?

MS. REED: Well, we are here seeking real property and we are seeking an accounting and turnover.

THE COURT: Well, turnover of what?

MS. REED: Well, we are seeking an accounting, your Honor. We don't know what they have done. In Granfinanciera, first of all, the holding says as follows - - excuse me, if I can just find it.

THE COURT: What were the citations, 109 Supreme Court - - -

MS. REED: 109 Supreme Court Reporter 2782 and, as I said - - -

THE COURT: What is the U.S. Reporter?

MS. REED: I don't happen to have that, your Honor. I am sorry, no I don't have that, Judge. At any rate, the holding in the Granfinanciera

case specifically held that where the trustee is seeking to set aside a fraudulent conveyance of a specific determinate sum and amount of money as contrasted to setting aside a fraudulent conveyance of a real property or for an accounting, which have always been equitable actions rather than actions of law, then there is no Seventh Amendment right to a jury trial and, therefore, your Honor, the Granfinanciera case does not entitle these defendants in this particular adversary proceeding - - -

THE COURT: You are saying that since it is not for money.

MS. REED: It is not for money. Let me read the question that was presented to the Court as framed by the Court. The question - - I am reading from Page 2787 of the Granfinanciera opinion. The question presented is whether a person who has not submitted a claim against the bankruptcy estate has a right to a jury trial

when sued by the trustee in bankruptcy, to recovery an allegedly fraudulent monetary transfer. Now, the Court goes on, at Page 2891, to distinguish actions for money damages - - which in Granfinanciera, that is what the trustee's actions were for.

THE COURT: The trustee's action is for money damages?

MS. REED: In granfinanciera is was.

THE COURT: Okay.

MS. REED: In our case it is not. It is specifically at Page 2791, it contrasts that from actions in which the trustee is seeking, the subject matter of the trustee's action is land or an intangible or the trustee seeks equitable aide for accounting or the like. That is at 2791.

THE COURT: Do you have a copy of that case?

MS. REED: I have this copy, your Honor, and would be happy to give it to you.

THE COURT: Let me have that, because I am up

here without it, without access to a library.

MS. REED: All right, your Honor. I am sorry, Judge, for not supplying the Court with one.

THE COURT: Well, normally I have a library close by.

MS. REED: There you go, Judge.

THE COURT: So, you are reading - - well, here is where they are talking about the - - -

MS. REED: Yes, your Honor, and as the opinion states at great length, what the court did in Granfinanciera was to go back and decide whether a particular type of action would have tried - -

THE COURT: When was the demand made here in our case?

MS. REED: When the demand was made? After the trustee was appointed and discovered that - - -

THE COURT: No, the demand for a jury trial.

MS. REED: The demand for a jury trial was made by the answer of the defendants filed on February 3rd.

THE COURT: Okay.

MS. REED: Also, if I may also point out to the Court, that it is entirely appropriate - - -

THE COURT: So, this boils down to a question of whether or not under the issues framed by the pleadings in this case, Granfinanciera would provide the right to a trial by jury.

MS. REED: That is exactly it, and it is the trustee's position, your Honor - - -

THE COURT: Now, you talked before about a counterclaim.

MS. REED: Yes, they did file counterclaims, all three of the defendants.

THE COURT: But then they had been dismissed or something?

MS. REED: They have been dismissed, but that doesn't negate the fact that they were filed, and that they filed these counterclaims in this particular adversary proceeding seeking affirmative relief and damages. Now the Court, on my motion to dismiss, found that the claims

should be - - -

THE COURT: This Court?

MS. REED: This Court.

THE COURT: What Judge?

MS. REED: Judge Cristol found - -

THE COURT: Okay.

MS. REED: - - that the counterclaims should be dismissed without prejudice, but that doesn't negate - - -

THE COURT: Well, they were dismissed by the Court.

MS. REED: They were dismissed by the Court without prejudice. However, that doesn't negate the historical fact that the claims were made, and I believe that not only, Judge, in the particular adversary brought by the trustee, not the narrow type of adversary that the Court was dealing with in Granfinanciera, who found that there was a jury trial right, not only is it entirely distinguishable as to the substantive causes of action that are being raised by the

trustee herein, but also - - -

THE COURT: Well, now, can you point out - - I know I have your copy of this - - where the Granfinanciera then addresses this issue of if you make a claim against the estate, you are not entitled to a jury trial?

MS. REED: The very first page of the opinion itself, your Honor, which is several pages into the copy that I have there.

THE COURT: All right.

MS. REED: The very first paragraph frames the question and includes as - -

THE COURT: The question is whether a person who has not submitted a claim against an estate has a right to a jury trial.

MS. REED: Now, your Honor, I pointed out the existence of these counterclaims because when a claim is made against a trustee who, in his capacity as trustee, is setting out to reach out and reclaim property of the estate and bring it

back into the estate, making a counterclaim against the trustee, affirmatively seeking relief in the adversary proceeding is tantamount to - -

THE COURT: You say once you make that claim, that is it.

MS. REED: That is it. First of all, under the Federal Rules of Civil Procedure, they have submitted themselves to the jurisdiction of the Court by making such a claim regardless of whether this jury trial issue was here. One of the things that they are saying is that they have never submitted themselves to the jurisdiction of the Court. If that were true, they threw that out the window when they filed their counterclaims, which, had the Court not dismissed them, would be before this honorable Court today. However, the Court did dismiss them. It doesn't negate the historical fact that they filed those claims and that they were seeking affirmative relief against the trustee, and because the trustee is operating under the

auspices or the various - - -

THE COURT: Just like the case where you filed - - where one might file a proof of claim, I think there have been some cases here - - -

MS. REED: Absolutely.

THE COURT: If you file a proof of claim and then get sued, and say, well, I want a jury, so I am going to withdraw my proof of claim, aren't there cases right on that?

MS. REED: There are, Judge.

THE COURT: Did you find cases dealing with situation, the counterclaim citation published decisions?

MS. REED: I don't have one with me, hour Honor, but I may also point out that this motion, which was filed by the defendants by facsimile, which they call motion for clarification and objection to non-jury trial, I would want to make this Court aware of the timing of what is going on in this case. This adversary proceeding was

filed by the trustee in July of 1991. Your Honor, through various dilatory tactics, there defendants did not file their answer until February 3rd, 1992, and, your Honor, on that day, was a day when a motion to have a default entered against them was scheduled and what they did was, we appeared in front of Judge Cristol, then handed me the answer right as I was about to ask the Judge to have a default entered and, in fact, that was the second time that a default was to be entered against them because the first time I filed a motion to dismiss, it was denied. An order was entered directing them to file their answers by October 14th, they did not. A motion for default was filed and default was entered. They moved somehow got that set aside and got additional time, until November, to file their answer. They didn't file anything then. We move for default and, as I said, we are talking from July, August, September, October, November, December, January, February, we are talking

nearly seven months between the time that our action was filed and the time they filed their answer.

THE COURT: What is the relevance of that to the jury issue?

MS. REED: Well - - and also, your Honor, that as far as the determination of whether it is appropriate for any issues in this adversary to be tried before a jury, there were several occasions on which these defendants could have brought the issue before the Court, brought it to the attention of the Court. We were in front of Judge CRistol on two occasions, the last of which was last Monday, in which they could have said, your Honor, by the was, we have a demand for jury trial - - -

THE COURT: Now, why wee you before Judge Cristol last Monday?

MS. REED: Well, I am getting to that, Judge, and it pertains to a very serious - - -

THE COURT: Was it a pre-trial conference?

MS. REED: No, your Honor, it was a motion that I had filed.

THE COURT: So, you are saying the statement was in the answer but it was never brought forward.

MS. REED: It was never brought to the attention of the Court, Judge, and, your Honor.

MR. DOGGETT: Your Honor, if I may - - -

THE COURT: Just have a seat, you will have an opportunity to respond.

MS. REED: As a matter of fact, your Honor, we were in front of Judge Cristol last Monday on a motion that I had filed for sanctions, to compel discovery, to compel production of documents, because three requests for production that I filed, one to each defendant, which I had filed in November of 1991, had not yet bee complied with.

THE COURT: Did he rule on that motion?

MS. REED: What happened was, the Judge, I

believe in exasperation, because it was like the second such motion that I had to file, said to the defendants, are you going to supply her with the documents - - you could hear the exasperation in the Court's voice, it was at the end of his morning docket. He asked us, as most Judges do, to see if we could come to a resolution.

THE COURT: We Judges love discovery motions.

MS. REED: I am very well aware of that and I don't bring a discovery related motion lightly. What we did was, we went outside the courtroom and the defendants agreed that they would supply me the documents by last Friday. In other words, this was Monday at around 12:00, noon, last Monday, and I was to have all of the documents by Friday. Now on Friday afternoon I went to the office of the defendants. Mr. Hemmerle - - S.I.R. and King of Clubs and Mr. Doggett all share Office space in the same building. So, your Honor, the passage of time was from Monday

at 12:00 till Friday at approximately 3:30 when I phoned and faxed a note to Mr. Hemmerle and Mr. Doggett that I was on my way to pick up the documents that they had promised me. By the way, after we had made that agreement, I want back into Court and announced to the Judge on the record that this is the agreement that we had reached, so that the Judge never really entertained the various other portions of my motion which sought sanctions against them for making me wait, your Honor, since November for these documents. Now, not only did they make me wait since that time, I had made a motion in January to compel them, okay, and the Court had said that they were to cooperate with me in order to provide me with these documents.

THE COURT: Well, we are getting aside from the jury issue.

MS. REED: Yes, we are, Judge, we are. I will save that part of it - - -

THE COURT: So, the background is that you

don't have.

MS. REED: This morning, as I said, last Friday when I went over there, they didn't have anything ready for me, and this morning they handed we an accordion folder with about an inch worth of documents and I had made notes on it as to whether they had responded to each and every item on the three requests for production, which, by the way, are not lengthy. I fact, the ones directed to each of the corporate defendants are virtually identical. I found, your Honor, that out of seven items each, requested by the corporate defendant, S.I.R. Investment, I received documents only on - - -

THE COURT: Again, we are getting off of the jury and that is what I wanted to - - -

MS. REED: Yes, Judge. I will save that for later. At any rate, your Honor, Rule 39, under the Federal Rules of Civil Procedure, it specifically states that your Honor can determine

either upon motion of a party or on your own motion, your Honor, whether it is appropriate, notwithstanding a party's demand for jury trial, whether it is appropriate that a jury trial be had, and if you find that the right of a jury trial on some or all of the issues does not exists - - clearly, under the Bankruptcy Statutes there is no right but, of course, we referring to the Granfinanciera, under that - - -

THE COURT: Has the 11th Circuit addressed the issue?

MS. REED: Not that I know of, your Honor.

THE COURT: But Granfinanciera came out of the 11th Circuit.

MS. REED: It certainly would be the law in - - because it is out of the Supreme court, we are bound by it.

THE COURT: Okay. Well, what is your response, Mr. Doggett? It looks like to me - - -

MR. HEMMERLE: May I respond, your Honor?

MR. DOGGETT: Mr. Hemmerle will speak first,

your Honor.

MS. REED: Your Honor, I want to make the Court aware of something else, Mr. Hemmerle is representing only himself. He is not a member of the Florida Bar and, therefore, any argument that he may make - - -

THE COURT: Are you a member of any bar?

MR. HEMMERLE: I am not quite sure. Your Honor, whether I am still a member of the Ohio Bar or not.

MS. REED: Your Honor, we have determined that he is not, but the fact of the matter is that Mr. Doggett is counsel of record for two corporate defendants. Mr. Hemmerle is not a defendant in the counts pertinent - - as it pertains to the fraudulent transfer.

THE COURT: Well, I want - - whichever lawyer for the defendant wants to address the jury issue, I want hear from him now.

MR. HEMMERLE: I would like to address the issue, your Honor.

THE COURT: All right. Now, it appears to me under my understanding and knowledge of the Granfinaciera case, that when counterclaims are made, that that destroys the right to a jury trial.

MR. HEMMERLE: Your Honor, I don't want to disagree with the Court, however, I think that you were right on point when you said where there was a creditor involved and where there was a claim made against the estate. This particular counterclaim was a compulsory - - -

THE COURT: When you bring a counterclaim, it is a claim against the estate - -

MR. HEMMERLE: Well, it was a - - -

THE COURT: - - when you state the complaint.

MR. HEMMERLE: Your Honor, it addressed the issues that were brought out in the case in chief regarding a setoff, primarily, for the most part, and it brought out - - -

THE COURT: Then, to make it worse, then you

lie behind the log, at pre-trial conferences, motions, you never bring this issue up, it get set for trial and then you, hey, guess what, we want a jury.

MR. HEMMERLE: No, you Honor, initially - - -

THE COURT: That is bad conduct.

MR. HEMMERLE: It is bad conduct except for one thing. Your Honor, we sought a jury trial in our answer to the complaint.

THE COURT: I am aware of that.

MR. HEMMERLE: And we - - -

THE COURT: Yes, are you here on this case?

UNIDENTIFIED: I thought it was 1522.

MR. DOGGETT: He may be, but he is not in this room.

MR. HEMMERLE: The jury trial - - -

THE COURT: Wasn't there a Hatch case on?

MR. DOGGETT: That's the lawyer, your Honor.

THE COURT: Oh, that's the lawyer.

MR. DOGGETT: Yes, your Honor.

MR. HEMMERLE: May I proceed, your Honor?

THE COURT: Yes.

MR. HEMMERLE: The jury trial situation was properly called for in the answer.

THE COURT: I am aware of that.

MR. HEMMERLE: The fact of the matter is, the pre-trial order set by the Court was not clear as to whether or not we were getting a jury trial, that is the reason I moved the Court for clarification and objection in the event there was no jury trial. Now, furthermore, your Honor, I would like to point out to the Court that the pre-trial order, we got one day - - as a matter of fact, I think it was on the 12th of this month. We weren't ever aware of what occurred at that point in time. Now, prior to that, we did supply 250 pounds of documents.

THE COURT: Well, be that as it may, there is not going to be a jury trial in this case and it is going to be tried this week because, one, when you file a counterclaim under the Granfinanciera

case, that is a claim against the estate that waives any right to a jury trial. Furthermore, when you lay behind the law, don't bring this up to Judge Cristol at any of these hearings, you come in here when the case is called for trial and bring it up for the first time, that is another was. So, there is going to be no jury. The case is going to go to trial. Now, let's discuss the trial.

MR. DOGGETT: May I make one comment before we move on?

THE COURT: No, we're on the jury trial issue right now.

MS. REED: I thought you were addressing the -

THE COURT: No, why don't we be ready to start, let me look at these - - -

MR. DOGGETT: Your Honor, for purposes of the record, may I make one point clear?

THE COURT: All right.

MR. DOGGETT: The point, your Honor, is that I am asking the Court to specifically rule - - if

the way I understand it is, that even if the claim, which I understand you are talking about was a mandatory, and the key word of that was a mandatory counterclaim, that the fact that the mandatory counterclaim was made, negates and destroys the - - -

THE COURT: I am ruling there is not going to be a jury trial in this case for the reason I have already said. So, be seated.

MR. DOGGETT: Thank you, your Honor.

THE COURT: How many witnesses will have?

MS. REED: Your Honor, I would expect no more than three, although I have listed more that that, that was in an abundance of caution. I believe three, maximum.

THE COURT: All right. Let's see, I have got this motion this afternoon, and they are coming back - - All right. Be ready by 1:30 tomorrow.

MS. REED: Your Honor, may I go back into the issues that I was discussing before about the

production of documents and they are pertinent as to the timing of the trial because of the reasons I would state to the Court.

MR. DOGGETT: Your Honor, we know of no pending motion, unless the Court - - -

THE COURT: Well, we will recess until 1:30 and then come back.

MR. REED: Thank you, your Honor.

MR. DOGGETT: We're required to come back here at 1:30 your Honor, is that correct?

THE COURT: Yes.

MR. DOGGETT: Thank you.

(Thereupon, a lunch recess was had, other matters on the Court's calendar were heard and the following proceedings were had:)

THE COURT: We're back on the Sun Island Realty Case. Ms. Reed, there was some issues that you wanted to bring up?

MS. REED: Yes, your Honor. Once again, Cynthia Reed on behalf of Daniel Bakst, Trustee, the plaintiff in the adversary proceeding. Your

Honor, I wanted to bring to your Honor's attention what I believe are egregious discovery related matters and misconduct that the defendants have engaged in this case, and this has a direct bearing on whether the trustee can go to trial tomorrow at 1:30, as your Honor had requested.

THE COURT: Okay. Wait just one moment. All right. Now, Ms. Reed.

MS. REED: Yes, thank you, your Honor. As I mentioned earlier this morning, Judge, the last time we were in front of Judge Cristol was last Monday, we were in his courtroom on my motion for contempt, sanctions, and to compel production of documents from the defendants and, as I stated this morning, the Judge told l;us to cooperate. We agreed that the defendants would produce those documents to me by Friday, May 15th. On Friday, May 15th, despite the fact that they had all wee, in addition to having the request for production

since, and I correct myself, I had said November, it should have been December 17th, 1991, they still - - -

THE COURT: Now, is there an affidavit to support what you say?

MS. REED: I will be sworn in right now.

THE COURT: All right. Do you swear to tell the truth?

MS. REED: I swear to tell the truth.

THE COURT: All right, you are sworn. Now, tell me what you would have in that affidavit.

MS. REED: All right. I expected to have those documents and they had agreed to have those documents ready for me on Friday.

THE COURT: Well, go back and explain, the hearing was - - -

MS. REED: The hearing was on may 11th and it was in the morning. At the end of the Judge's morning calendar we were heard, we had about three minutes. I told the Judge, basically, that I wanted the documents. The Judge, in

exasperation, said to the defendants, are you going to give her the documents? Go out there and tell her when you are going to give them to her, meaning me. We went out, we discussed it. We said Friday, May 15th. They had to leave. I told them that I would go back and announce that to the Judge. After the lunch break when the Court resumed at 1:30 or thereabouts, I announced to the court simply that we had reached an agreement, that they had agreed to produce the documents to me.

THE COURT: That was on the record?

MS. REED: That was on the record, your Honor, and the Judge said, very good, he accepted that. From that afternoon until the late afternoon, close to five o'clock on Friday, May 15th, the defendants had ample time to assemble the documents. I may note again that the request for production was served upon them on December 17th, 1991. their failure to supply - - -

THE COURT: December of 1991?

MS. REED: Exactly, Judge.

THE COURT: The exact requests?

MS. REED: The exact requests were served, three of them. They had sever items each in the request propounded to the two corporate defendants.

THE COURT: Describe generally what you were -

MS. REED: I can show your Honor what there were, if I may approach the Bench.

THE COURT: Well, I would rather you just - -

MS. REED: Yes, Judge.

THE COURT: - - describe in general terms what they are.

MS. REED: Corporate books and records of each of the two corporate defendants from 1989 to the present, that being the period of time during which they allegedly, they received the property, the real property and may have been collecting rents since that time. Canceled check, et ectera, cash receipts, copies of cashiers checks

or all other documents relating to the transfer of payment by S.I.R. and then, again, by King of Clubs of any part of $14,168,000 in monies to Sun Island, which was referred in a document that the defendants relied upon to establish that there was consideration for these transfers. They didn't supply, number one, the corporate books and records, they didn't supply any documents pertaining to consideration paid from either of the corporate grantees from, the Sun Island Realty, the debtor and grantor under these deeds that we are seeking to set aside. Next, I want the canceled checks, receipts, copies of cashier's check or other documents showing transfers of funds, et ectera, from S.I.R. to Sun Island as payment for the quit claim deeds. Okay, basically, that is the same thing, just stated a little differently.

THE COURT: So, you are talking about copies of corporate records, deeds and proof of payment?

MS. REED. Proof of payment to show that there was consideration, because they say that these were not fraudulent. Next, I wanted copies of all written leases with any tenant of any of the properties described in the adversary complaint, the real property, pieces of real property, most of which were commercial and there were some residential. Next, accounts receivable ledger, receipt book and other documents indicating receipt of rental payments by either of the corporate defendants on those properties, and the accounts receivable ledgers, case receipts and other documents showing receipt by either of the defendants on any property owned by Sun Island Realty. Again, going to our request to have them account for what they, property of the estate that they may have received. Next, all corporate books and records of Sun Island Realty or King of Clubs.

THE COURT: All right. Well, that - - -

MS. REED: All right. Your Honor, as I said,

when I went down there from my office in West Palm Beach, I went down there to pick up those records.

THE COURT: Down where?

MS. REED: Fort Lauderdale, Judge. It is a drive of approximately an hour.

THE COURT: Okay.

MS. REED: That was not the first time I had gone down there. I had gone down there back in march, because in keeping with the Judge's order, which the Judge entered on February 28th, 1992 - and I could show the Court a copy.

THE COURT: He entered an order and that somehow was vacated or something or what happened?

MS. REED: What happened was, after I filed the request for production, and I didn't get a response, I didn't get the documents, I filed a motion to compel production of the documents. I filed that on or about January 24th, 1992.

THE COURT: And then that became moot or something.

MS. REED: And along with that there were several other motions. There is a motion for default and a motion for sanctions. That matter - - all those three matters were heard before Judge Cristol at a hearing on February 3rd, 1992. At that hearing he said that the defendants having filed answers on February 3rd, the motion for default is rendered moot, and the Court held in abeyance my motion for sanctions and a motion to compel production of documents pending compliance by the defendants with the further provisions of the order. I am reading from the order that the Court had entered in February. The order further states in Paragraph 3: "The defendants and their counsel shall cooperate with plaintiff to schedule - - -

THE COURT: Let me see that order.

MS. REED: Thank you, your Honor.

THE COURT: So, what happened to this? This

got vacated or - - -

MS. REED: What ended up - - no, that order was never vacated, Judge. What ended up happening was that in March, again, in an effort to cooperate with these defendants and make it as easy as possible for them to produce documents, I, one again, traveled down to their office in Fort Lauderdale from my office in West Palm Beach. I was presented with what I can only describe as a car, a trolley looking thing, it is about half the size of this desk (indicating), about this deep (indicating), your Honor, about two feet deep, packed in with documents that were just shoved in and they were in no discernible order. I spent approximately five hours in the library of the defendant's office going through these documents in what turned out to be a vain attempt to find anything in there that was responsive to my three requests for production. It had been represented to me, and the reason

that I had gone down there was for the purpose of looking at these documents on the representation that they were responsive to the request for production. They were not. In addition, Judge, when I took the deposition of Mr. Hemmerle, who appeared on his own behalf, as well as on behalf of the two corporate defendants, it became clear throughout his testimony that there were documents that existed that were responsive to my request for production. I was told at that time that they were either at the accountant's office, they were somewhere else in the building, they certainly weren't around, but that they would be assembled and they would be given to me. Now, the defendants are going to say that I promised that I would give them a written list of what they needed. Your Honor, the list is what is on those three requests for production, which they have had since December 17th or thereabouts of 1992. We are now in the late part of March, four months have gone by. I still don't have

documents from. I have been led on one wild goose chase, going over there and looking at unresponsive documents for five hours. After the depositions were taken in March, I waited for them in good faith to come forward with these documents. When they did not do so, I wrote letters to them, which I sent by certified mail, I don's happen to have them with me right now, but the certified mail receipts were signed by persons at their address showing that they were received. I said in the letters, in substance, that I had given them approximately, at that time, three weeks to come up with the documents, I had heard nothing from them, I had seen no documents. I told them that it left me no chose but to file a further motion to compel and for contempt this time for failure to comply with the order, which I have just handed your Honor. I got no response whatsoever from that. Then I filed my last discovery related motion entitled

Plaintiff's Motion for Contempt, Sanctions and to Compel Production of Documents for the defendants, in which I recited the litany of discovery misconduct that I have just related to the Court this afternoon, and that was the motion that was heard before, heard in part, because of Judge Cristol' rushed calender that morning. Now, I thought that finally good faith would be shown in this matter. It has not been shown, your Honor, and I would point out to the Court that although I traveled from my office in West Palm Beach to the defendant's office in Fort Lauderdale in order to not only take their depositions, but to review documents not one but two times, when I could have, under the applicable rules, had them come to my office up in West Palm Beach, it's in the same district, I bent over backwards, Judge, to make sure that if those documents were voluminous or required - - -

THE COURT: So what are you requesting?

MS. REED: What I am requesting, Judge, is that

because they, after being given until Friday, they still didn't' have the documents ready for me - - they handed me something this morning which they purport to be responsive. I found amongst the papers which were about this thick (indicating), documents which responded only to one of my items, and that being the leases, there were a few leases. I didn't find any documents relating to receipt of rent, no documents relating to consideration paid by the defendants in exchange for these transfers, nothing like that whatsoever. Your Honor, I feed that this conduct is the utmost bad faith on the part of the defendants. I find, your Honor, or I submit to you, your Honor, and hope that the Court will also find that it was an intentional, willful and totally unexcused disregard, not only for the rules of procedure regarding production, regarding discovery, but also - - -

THE COURT: What are you requesting?

MS. REED: I am requesting, your Honor that sanctions be imposed today because of this - - -

THE COURT: What kind of sanctions?

MS. REED: I would seek the striking of the defendants' answers, your Honor, and the entry of default, which, if I may point out to your Honor, that Judge Cristol contemplated that would occur for failure to the defendants to comply and to cooperate with discovery.

THE COURT: This was last week?

MS. REED: This was in the February 28th order, which your Honor has.

THE COURT: Oh, in this one?

MS. REED: Yes. He specifically stated that if ;they fail to cooperate, that he would entertain my motion for sanctions, my motion for entering a default.

THE COURT: Did he at the pre-trial, it says at the pre-trial conference, the Court will hear a motion for default.

MS. REED: They did not appear at the

pre-trial conference, your Honor.

THE COURT: The defendants didn't?

MS. REED: No, they did not.

THE COURT: Well, which one of you wants to respond?

MR. HEMMERLE: I will. Would you like to put me under oath, your Honor?

THE COURT: So, you are responding for all of the defendants?

MR. HEMMERLE: Yes, because I am interrelated with the other defendants as well, and I have more knowledge of what Ms. Reed - - -

THE COURT: All right. You are sworn to tell the truth.

MR. HEMMERLE: First of all, your Honor, when the initial request for production of documents was made, a response was immediately sent to her stating that those documents would be made available for examination and a copy - - and at the office where they existed. Subsequently, Ms.

Reed came to the office and there was over 250 pounds of documents presented to her. She spent, as she says, a few hours in the library reviewing those documents. She left, she came back and, while taking my deposition, whereby I represented myself, as well as the corporate defendants at that deposition, she made a list of six additional documents and she told me she would formulate a list - - and this is what I told Judge Cristol - - and send it to me. She's never done that. Now, I did, however, after the meeting we this past Monday at Judge Cristol' hearing, agree that I would go through those documents and I would dig out everything, I said because that's all we have. We can't produce something we don't have. Everything is in that little cart. I walked through those documents and I found about 25 additional or 30 additional documents that she had requested, and I made copies of all those documents, I brought them and she - - oh, incidentally, she said she would be

in my office on Friday. Well, she faxed me a deal at 4:30 on Friday and, as she says, she got there around 5 o'clock, and I immediately called her back and I says, you know, I thought we were going to be here and go over these documents, I talked to her secretary, Becky, and said we will go over these various documents to see what you want, because I still got the 250 pounds of documents. I am not going to copy everything there until she tells me, because she had been through that already. I promised her the assistance of someone to make copies for her of anything she needed. She come there at five o'clock and I says, you know, this is, the day is over with. I says, why don't I do this, if it is all right with you, if you want to stay here, we will go through them. Otherwise, I will work here tonight and over the weekend, and I will get all those documents for you at calendar call in Miami on Monday. She said, that's fine. I did exactly

that, your Honor, I brought her those documents this morning before we were addressed.

THE COURT: Now, let me ask Ms. Reed, he is telling me there was an agreement to bring the documents this morning.

MS. REED: No, your Honor, I never agreed to that. I do know about the telephone call that he relates to my, that he made to my secretary. The chronology of events on Friday afternoon was that at approximately 3:30 I phoned their office. I was told that Mr. Hemmerle was not in the office and that Mr. Doggett was on the other line. I didn't know what that meant. I left a message that said, call me immediately. When I didn't receive a return phone call from Mr. Doggett, who was the attorney for the two corporate defendants, I personally wrote out a note and faxed it at approximately 3:40 in the afternoon. I then got in my car - - and the note said, I will be coming down there to get the documents. Now, that shouldn't have been a surprise since

they agreed - - -

THE COURT: And you just said, I'm on the way?

MS. REED: I'm on the way.

THE COURT: All right. Now, he said you got there and you agreed to wait until this morning.

MS. REED: No, I did not. What happened, your Honor, was that my secretary, whose name is Debbie, phoned me in my car when I was on the way down there, I was nearly halfway down there, saying that Mr. Hemmerle had called and said that he didn't have the documents ready, that he wanted to, and the language that he is relating is what she related to me, that he would work all night to get them, and that he wanted to submit them to me at this calendar call. I never spoke to the gentleman during that period of time. I never agreed to that. I did show up down there because I was almost there and I wasn't about to turn around again. When I entered the office, Mr. Hemmerle met me in the lobby of the office. He

said to me, I still don't know what documents you want. I handed him a list of items from the three requests for production and advised him to make a copy. He said that he would work all night on it. I simply said, Mr. Hemmerle, I cannot stay. I have to leave, it's 5 o'clock.

THE COURT: Okay. That's enough.

MS. REED: I did not agree to waive that, Judge.

THE COURT: You can sit down. So, what else do you have to say, Mr. Hemmerle?

MR. HEMMERLE: Well, first of all, your Honor, initially as I stated before, all of the documents, and she has them all, and she has reviewed them all. Every document that is in our possession has been given to Ms. Reed and she has reviewed them. Now, to come into Court and say that I disregarded that - - -

THE COURT: But you gave them to her this morning.

MR. HEMMERLE: No, no, those same documents

that she had already reviewed, I dug those out of the 250 pounds of documents I produced for her and told her at that time, Ms. Reed, you pick out what you want. We will copy them for you, no charge, we will just do that to assist her in - -

THE COURT: You did this last Friday?

MR. HEMMERLE: Beg your pardon?

THE COURT: When are you talking about, when?

MR. HEMMERLE: I am talking about when she came down.

THE COURT: When she came down, just this last Friday?

MR. HEMMERLE: I don't know - - no, not this last time, your Honor. She came down there a month age regarding the production of documents or six weeks ago, I might say, and she was - - I produced all of those documents in this little car that she's talking about, full of documents, 250- pounds of them, everything that we had relating to this property or anything else that

could ever give rise to whatever claim she seems to think she has, she has had everything. Now, when she took my deposition about three weeks later, she says, well, there are certain documents that I was unable to find and this is what I want. I said, you make me a list, Ms. Reed, you send me the list, I will go, I will hunt for them myself, because we do have certain leases, they are in that pile, although you didn't find. We also have these other things.

THE COURT: All right. stop right there. Sometimes it is easier just to - - now, you mentioned that before, that he said that you said you would sent him a list or - - -

MS. REED: Your Honor, we sat there and discussed after the deposition what I needed. I referred to him and I read to him from my request for production at that time - -

THE COURT: Okay.

MS. REED: - - and his attorney - - -

THE COURT: But you said I want what's on my

request.

MS. REED: His attorney made a list. Yes, Judge, his attorney made a list of what there was to be - - -

THE COURT: Who was his attorney?

MS. REED: The man sitting right there, Mr. Richard Doggett.

THE COURT: Okay.

MS. REED: - - and most of the documents that I was seeking were those from the corporate defendants. I also wanted to point out to the Court that the documents given to me this morning do not - - with the exception of a couple of documents that were exhibits to our complaint, which we had before we did any request for production - - we're not amount this so-called 250 pounds of documents. I, your Honor, am not in the business of filing request for production and going back and forth between West Palm Beach and Fort Lauderdale for my health. Had the

documents that were given to me today, most of which are non-responsive anyway, but there were a few leases in there, had they been among those papers, I would have asked for them to be copied, and they were not.

MR. HEMMERLE: Your Honor, in all sincerity, Ms. Reed's request for sanctions, at that point, since all of the documents we had been produced in just an attempt to circumvent this trial because she knows it's fraudulent to begin with, her entire complaint is fraudulent. The fact of the matter is I attempted - - there is nothing more I can do. I mean, I have given her every document that I have. She has in her possession or she may not have in her possession, but they were available to her. I have given her the things that I could recall on the list, and that was in that pile. There is nothing more I can - you might ask Mr. Doggett, your Honor, whether -

THE COURT: Well, I asked which one of you was going respond. I am not going to hear there

response. Well, this comes down to a matter, and it is unfortunate that I haven't heard these other motion in this case, but I see what Judge Cristol ordered back in February, and the analysis of that really becomes one of what happened after that in the way of a voluntary, good faith compliance with the Federal Rules of Civil Prodecure as they relate to discovery, and plus the pre-trial orders in this case, and I have heard the mother motions in this case, I have now heard the the sworn statements of the lawyers, and it's a matter of whether or not the defendants have in good failth complied with the repeated orders of Judge Cristol and the request for discovery that have been made under the rules. I find from the statements that it is simply more credible to believe Ms. Reed in what she says. I don't know Mr. Hemmerle and what ever did in Ohio, and that is not an issue here, but I do know haw lawsuits are supposed to be

tried in the Federal Courts, and there is more and more complaints by the public and everybody else about litigation and these kinds of discovery problems. I know lawyers that try to take advantage of the rules and drag these things out and avoid discovery, complicate litigation, hope that the other party will be so frustrated and obfuscated by dilatory tactics that they will somehow gain some kind of an advantage, and that simply is not going to happen, and I can see what has happened in this case, and I can see the delay that's been caused, and I can see these worthless motions on other matters, some of which I heard at length this morning. It is the kind of case that Rule 37 is designed to deal with, and it provides me numerous sanctions that can be imposed, which I'm going to do, and it is a matter now of which to choose. Since it appears oftentimes you don't want to penalize a party for what its lawyer may have done, so a sanction other than dismissal or entry of a judgment will

be chosen for that reason, but here Mr. Hemmerle is representing himself and is connected with these corporations. They are here, so you don't have that barrier of defense, if you will, between the lawyer and the defendant, and I am going to have to conclude that based on the conduct that I have heard and the statements of counsel that I have heard, that the appropriate remedy is to enter a default judgment in favor of the plaintiff for the relief sought in the complaint, and that will be the order of the Court and I ask you, Ms. Reed, to get that judgment to me tomorrow.

MS. REED: I will do so, your Honor.

THE COURT: All right. The parties may be excused.

MS. REED: Thank you, Judge.

(Thereupon, the hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)
: SS
COUNTY OF DADE)

I, CHERYL L. KRIEL, Shorthand Reporter and Notary Public in and for the State of Florida at Large do hereby certify that I was authorized to and did report in shorthand the proceedings at the foregoing hearing, and that the pages, numbered from 1 through 56 inclusive, contain a full, true and complete transcription of my shorthand report of shorthand report of same.

WITNESS my hand this 20th day of August, 1992.

/s/*Cheryl L. Kriel*
Cheryl L. Kriel

My Commission Expires:
December 27, 1993

PUBLISHER'S NOTE:

THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING:

A92

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 93-5206

D. C. CASE NO.: 92-6935-CIV-ARONOVITZ

KENNETH V. HEMMERLE, SR., S.I.R. INVESTMENT & DEVELOPMENT INC., and KING OF CLUBS, INC.,

Appellants,

-VS-

DANIEL L. BAKST, Trustee,

Appellee.

INITIAL BRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

KENNETH V. HEMMERLE, SR.
808 Northeast Third Ave.
Ft. Lauderdale, FL 33304
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CERTIFICATE OF INTERESTED PERSONS

Bankruptcy Court	THE HONORABLE A. J. CRYSTOL
United States District Court	THE HON. SIDNEY M. ARONOVITZ
Attorney for Appellee	LESLIE GERN CLOYD, ESQ.
Appellants	KENNETH V. HEMMERLE, SR.; S.I.R. INVESTMENT & DEVELOPMENT, INC. and KING OF CLUBS, INC.
Appellee	DANIEL L. BAKST

CORPORATE DISCLOSURE STATEMENT

There are no parent companies, subsidiaries or affiliat
have issued shares to the public.

STATEMENT REGARDING ORAL ARGUMENT

Appellants seek Oral Argument in this Cause.

PREFACE

Appellants' KENNETH V. HEMMERLE, SR. ("HEMMERLE"), S.I.R. INVESTMENT & DEVELOPMENT INC. ("SIR"), KING OF CLUBS, INC. "KOC") will be designated as Appellant, Appellants, Defendants, or in their individual names or designations as above shown.

Appellee will be designated as Appellee, Plaintiff or BAKST.

Citations to the Record or Docket will appear as (R.__)

Citations to the Appendix will appear as (App.___).

Citations to the Transcript of Final Hearing will appear as (Tr.____).

Citations to District Court's Oral Argument will appear as (Agr.____).

All emphases appearing in this Brief will be that of the author unless otherwise noted.

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STATEMENT OF JURISDICTION

This Court has subject matter and appellate jurisdiction over this appeal from the United States District Court pursuant to FRAP 4. The appellate jurisdiction arises from the denial of due process in violation of the Fifth Amendment of the Constitution of the United States. Further, this Court has jurisdiction pursuant to the First Amendment of the Constitution of the United States to petition the Government for a redress of grievances, and jurisdiction pursuant to the Seventeenth Amendment to the Constitution as a right to a jury trial.

The District Court had jurisdiction over the subject matter due to an adversary complaint filed in the Bankruptcy Court. The Bankruptcy Court's jurisdiction was based upon 11 U.S.C. § 548.

STATEMENT OF ISSUES

1. The United States Bankruptcy Court cannot enter a Default Judgment against Appellants after a responsive pleading has been made without given notice of hearing. A Default Judgment entered without such notice is in violation of Rule 55(b)(2) of the Federal Rules of Civil Procedure.

2. The United States Bankruptcy Court cannot set aside transfers of properties where the transfers were made over a year prior to the filing of a proceeding in Bankruptcy. To set aside such transfers is in violation of 11 USCS § 548 of the Bankruptcy Code.

3. The United States Bankruptcy Court cannot apply Rule 37 of the Federal Rules of Civil Procedure as a sanction where no Order has been entered which would show a failure to comply.

4. The United States Bankruptcy Court cannot permit total or partial destruction of vested property rights in violation of the Fifth

Amendment of the United States Constitution.

5. The United States Bankruptcy Court cannot deny Appellants their Constitutional Right under the Seventh Amendment to the Constitution by denying a trial by jury regarding claims of fraudulent transfer.

6. Each and every act in regards to the claims made by the adversary complaint, were without jurisdiction and a violation of Appellants' Constitutional guarantees regarding due process and access to the Court.

7. The United States District Court in its Appellate Capacity has failed to address Appellants' Points on Appeal regarding whether or not Rule 55(b)(2) of the Federal Rules of Civil Procedure has been violated and whether or not Rule 37 of the Federal Rules of Civil Procedure applies without notice or where no order has been disobeyed.

STATEMENT OF THE CASE

On or about September 19, 1989, a special meeting of the Board of Directors of **SUN-ISLAND REALTY, INC.** (hereinafter "**SUN**") was held to determine certain obligations and exposures by **SUN** resulting from guarantees and financial assistance to **KENNETH V. HEMMERLE, SR.** (hereinafter "**HEMMERLE**") and/or his corporate vehicles. A copy of the minutes are attached as (App. "1"). At this meeting, the Chairperson advised the Board that the corporation was exposed in the amount of $14,168,000.00 which was secured by real property in excess of that amount. The Board requested **HEMMERLE** to assign $14,168,000 of a $25,000,000 final judgment received on the 14th of September, 1989 (App. 2). As a result of the assignment, **SUN** agreed to return all properties held in trust as security for its exposure, and agreed to satisfy all present liens and mortgage on the properties from the $14,168,000, thus, releasing **SUN** of all

liabilities. On September 28, 1989, **SUN** transferred by quit claim deed (App. 3), the properties, back to the rightful owner as suggested by **HEMMERLE** and divested itself of the security for any and all obligations.

On or about September 24, 1990, **SUN** filed a voluntary petition in the United States Bankruptcy Court under Title 11 of the Bankruptcy Code for reorganization.

On or about the 5th day of November, 1990, a non creditor, **DM MOODY & SONS, INC.** moved the Bankruptcy Court for the appointment of a Trustee, notwithstanding that it was not a creditor of **SUN**, and was only involved in litigation regarding certain equipment, and was the defendant in that litigation. Following the motion by the non-creditor, the Bankruptcy Court appointed, without hearing, **DANIEL L. BAKST, ESQ.** (hereinafter "**BAKST**") as Trustee of the Debtor's Estate. Following the appointment as trustee, on the 19th of March, 1991, **BAKST** without request or

complaint from any of the creditors, filed a motion to convert the Chapter 11 case to a Chapter 7 case, for the purpose of given control of the assets of the Debtor, and to dispose of such assets for the percentage gain permitted by the Bankruptcy Code. On May 1, 1991, after hearing argument regarding any reason for a conversion, the Bankruptcy Court denied **BAKST'S** motion to convert. Without notice or hearing, five (5) days after the denial of the motion to convert, **BAKST** prepared an order for conversion to Chapter 7 which the Bankruptcy Court entered notwithstanding the denial just five days earlier (App. 4). The Debtor never received a copy of the order of conversion.

On or about July 26, 1991, **BAKST** filed an Adversary Complaint styled as Case No. 91-658-BKC-AJC-A, naming Appellants, **KENNETH V. HEMMERLE, SR., S.I.R. INVESTMENT & DEVELOPMENT INC.**, and **KING OF CLUBS, INC.**, as Defendants, (R. 1, Accordion folder #1). On or about August 19,

1991, a Notice of Lis Pendens by Plaintiff was entered on the docket bearing a certificate date of July 26, 1991. No notice of Lis Pendens was attached to the Complaint, and Appellants never received a copy of such Lis Pendens (R. 10).

On or about August 12, 1991, **HEMMERLE** filed a Motion to Dismiss the Adversary Complaint (R. 1, Accordion Folder #1), alleging that the Court lacked jurisdiction over; (1) the subject matter; (2) over Defendant **HEMMERLE** or any other named Defendant; and, (3) that the Complaint failed to state a claim upon which relief could be granted.

On August 26, 1992, Defendants collectively filed a Motion to Dismiss (R. 1, Accordion Folder #1). On September 23, 1991, both motions to dismiss were heard, and on October 4, 1991, the Court entered its Order denying the Motions (R. 1 Accordion Folder #1). On October 12, 1991, Defendants filed a Motion for Rehearing and Objection to Findings and Order (R. 1). Although

the docket sheet shows an order granting in part, denying in part Defendant Motion for Rehearing, the Defendants never received a copy of this order.

On December 18, 1991, Plaintiff filed a Request for Production of Documents on all Defendants (R. 1). And on December 31, 1991, the Defendants filed a Response to Plaintiff's request for production of documents stating "any and all documents requested by Plaintiff in the Motion dated the 17th day of December, 1991, which are in the possession or under control of . . . DEFENDANTS. . . that contains evidence, not privileged, relating to the subject matter of this action will be available for inspection and copying at 808 Northeast Third Avenue, Fort Lauderdale, Florida 33304, upon reasonable notice (R. 1)(App. 9).

Pursuant to a Notice of taking Deposition of **HEMMERLE** (R. 1), a deposition duces tecum was had, at which time **HEMMERLE** produced

all documents in his possession or in the possession of the co-defendants to **CYNTHIA A. REED, ESQ.** as examiner for Plaintiff. Ms. Reed inspected the documents, but failed to seek the copying of same, and upon conclusion of the deposition, left without the documents sought by the duces tecum.

On February 3, 1992, Defendants filed their Answer, Affirmative Defenses and Counterclaim (R. 1).

On February 28, 1992, Plaintiff filed a Motion to Dismiss Defendants' Counterclaim and Affirmative Defenses (R. 1). The Motion to dismiss was denied. On March 23, 1992, Plaintiff filed another motion to strike affirmative defenses and dismiss the Counterclaim, and scheduled the hearing for April 6, 1992. (R. 1).

On March 26, 1992, the Defendants/Counter-claimants filed a response to Plaintiff's motion to strike affirmative defenses and dismiss

counterclaim (R. 1). On April 24, 1992, the Court denied Plaintiff's motion to strike affirmative defenses and granted Plaintiff's motion to dismiss the Counterclaim.

On May 1, 1992, the Court set Calendar Call for May 18, 1992 (R. 1). The trial was to start sometime following Calendar Call. Notwithstanding that the Defendants had made a timely demand for a jury trial, Defendants were uncertain as to whether or not the cause would be tried by a jury, and for that reason, Defendant on May 12, 1992, filed a motion for clarification and objection to a non-jury trial (R. 1).

At Calendar Call, after argument regarding Defendants' Motion for Clarification and Objection to non-jury trial, which visiting Judge **BOHANON** denied, counsel for Plaintiff, one **CYNTHIA A. REED, ESQ.**, without notice of hearing, made an ore tenus motion for a Default and Default Judgment, and did in fact obtain a Default and Default Judgment (Tr. 34-56) on the

basis that the Documents requested were delivered late and violated the order of Judge **A. JAY CRISTOL**. Visiting Judge **BOHANON**, granted Plaintiff's Motion to Strike Defendants' pleadings and entered a Default and Default Judgment (Tr. 55) (R. 1). Immediately thereafter, Defendants filed a Motion to Set Aside Entry of Default and Default Judgment, and Motion for Stay of Execution of Judgment Pending Disposition of the combined motions (R. 1). Although, the Docket Sheet shows that on June 17, 1992, this motion was denied (R. 1), the Defendants first became aware of such denial upon obtaining a copy of the Docket Sheet from the Clerk of the District Court on November 3, 1992 for the initial brief in the District Court.

It is from this Default Judgment, and Denial of a Jury Trial that Defendants have taken this appeal.

STATEMENT OF THE FACTS

On May 18, 1992, at Calendar Call, counsel

for the Plaintiff, **CYNTHIA A. REED**, requested that Defendants' pleadings be stricken (R. 1)(Tr. 34-56) and a Default and Default Judgment be entered. This request was based upon an unsupported allegation that Defendants failed to produce certain documents prior to Calendar Call.

On May 11, 1992, the same **CYNTHIA A. REED, ESQ.** sought sanctions for Defendants' alleged failure to produce documents requested, notwithstanding that all documents in possession of the Defendants had already been produced. On May 11, 1992, Judge **A. JAY CRYSTOL** denied Plaintiff's requests for sanctions and suggested that the parties go outside in an attempt to settle the question of whether or not all documents in possession of the Defendants had been produced.

After outside discussion with Ms. **REED**, Defendant **HEMMERLE** agreed to assist Ms. **REED** in the re-production of all documents previously presented to Ms. **REED**. This assistance was to be

made on Friday, May 15, 1992, prior to the Calendar Call scheduled for Monday, the 18th of May, 1992. After 5:00 P.M. on Friday, May 15, 1992, Ms. **REED**, appeared at 808 Northeast Third Avenue, Fort Lauderdale, Florida, but refused to stay or assist with the review and copying of the documents which she requested. Rather she gave **HEMMERLE** a list of the documents requested and left. Since this was a weekend, **HEMMERLE** was unable to contact her in which to give her the documents until Monday, May 18, 1992. Although the Documents were unnecessary for any assistance at trial, Ms. **REED** argued to the Court that the reason Judge **CRISTOL**, on May 11, 1992, denied her request for sanctions, was due to his exasperation. However, it was explained to Judge **CRISTOL** that all documents had been given to Ms. **REED**, but she failed to copy the same. **HEMMERLE** agreed to go over all documents and papers with Ms. **REED** for yet a second time, on Friday, May 15, 1992, and copy any and all documents she

requested.

Notwithstanding, that **HEMMERLE** complied with all orders of the Court and all requests made by the Plaintiff, Judge **BOHANON**, based on the unsupported testimony of Ms. **REED**, made ore tenus, at calendar call, after declaring that she was not ready for trial and contrary to notice requirements of Rule 55(b)(2) and Rule 37 of the Federal Rules of Civil Procedure, struck the Defendants' pleadings and entered a Default and Default Judgment, all of which denied the Defendants' due process.

An appeal was taken to the District Court of the Southern District of Florida. The Appeal was founded on six (6) points, as follows:

POINTS ON APPEAL TO THE DISTRICT COURT

POINT I.

DID THE BANKRUPTCY COURT ABUSE ITS DISCRETION IN ENTERING THE DEFAULT JUDGMENT, REQUESTED ORE TENUS, AND ENTERED IN VIOLATION OF RULE 55(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE?

POINT II.

DOES THE BANKRUPTCY COURT HAVE JURISDICTION TO SET ASIDE TRANSFER OF PROPERTIES WHEN SUCH TRANSFERS WERE MADE OVER A YEAR PRIOR TO THE TIME OF SUN'S FILING OF THE CHAPTER 11 PROCEEDINGS AND IN VIOLATION OF TITLE 11, SECTION 547?

POINT III.

DOES THE CHAPTER 11 TRUSTEE HAVE AUTHORITY TO FILE AN ADVERSARY COMPLAINT AFTER A CONVERSION TO A CHAPTER 7 IN VIOLATION OF 11 USCS, SECTION 348(e)?

POINT IV.

DID THE BANKRUPTCY COURT ABUSE ITS DISCRETION BY ENTERING A DEFAULT JUDGMENT PURSUANT TO RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE ABSENT NOTICE AND HEARING PURSUANT TO RULE 55 OF THE FEDERAL RULES OF CIVIL PROCEDURE?

POINT V.

DID THE BANKRUPTCY COURT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANTS THEIR CONSTITUTIONAL RIGHT UNDER THE SEVENTH AMENDMENT TO THE CONSTITUTION BY DENYING THEM A TRIAL BY JURY AS TO ISSUES SO TRIABLE?

POINT VI.

DOES RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRE THAT AN ORDER HAS BEEN VIOLATED PRIOR TO THE IMPOSITION OF SANCTIONS BY ENTERING A DEFAULT AND DEFAULT JUDGMENT?

SUMMARY

The District Court in its Order Affirming Final Orders and Final Judgment of the Bankruptcy Court failed to address the issues regarding Point I, Point II, Point III, Point IV and Point VI. It is clear that by addressing the issues or points on appeal, the reviewing court would have made a determination that the Default and Default Judgment entered in violation of Rule 55(b)(2) and Rule 37, of the Federal Rules of Civil Procedure and is void as a matter of law, in that such violations are an absolute denial of due process. By the affirmance in the Court below, it is clear that the Court incorrectly believed that the Defendants disobeyed an Order of the Bankruptcy Court. A review of the record reveals that at no time did Defendants disobey an Order of the Bankruptcy Court. Although, subsequent to the entry of the Default and Default judgment, the Bankruptcy Court on June 18, 1992 entered an Order nunc pro tunc, prepared by the Plaintiff which indicated that the

Defendants disobeyed certain oral orders of the Court.

The Order affirming Final Orders and Final Judgment of the Bankruptcy Court was based upon Defendants' failure to comply with the Court's Order for the production of documents. Nowhere in the record can there be found an Order with which Defendant failed to comply . The lower Court in its determination relied upon Appellee's Brief and not upon the record. The Order of the lower Court is in error for the following reasons: (1) page 2, which states that **HEMMERLE** is an insider of the Debtor is untrue. **HEMMERLE** was an employee of the Debtor, but did not own one share of stock of the Debtor; (2) page 2, which states that "Despite being ordered to file a response to the adversary complaint, and the subsequent entry of a clerk's default which was later vacated, Appellants finally filed their answer." The Court overlooked the fact that a motion for Rehearing on Defendants' Motion for

dismissal was unresolved, as such, no responsive pleading was required. Furthermore, there was never an Order to file a response to the adversary complaint; (3) page 2 and 3, the June 18, 1992 Order was subsequent to the May 18, 1992 Default and Default Judgment, as such, Defendants were unaware of any Order requiring additional production of documents. This Order was prepared by the Plaintiff without request of the Court, or without a hearing in which to support such an order, and was prepared for the sole purpose to show a disobedience of a Court Order where none existed; (4) page 3 and 4, "The bankruptcy court found Appellee's counsel the more credible witness. The bankruptcy court found that Appellants did not act in good faith compliance with discovery orders." First of all, all discovery orders were in fact complied with, second, although the judge may have found appellee's counsel the more credible witness, it failed and refused to permit counsel for the

corporate defendant to testify; (5) page 4, "the bankruptcy court found that striking of Appellants' answer and the entry of a default were the appropriate sanctions under Fed.R.Civ.P. 37, and Order Granting Plaintiff's Motion for Sanctions and Entering Default Against the Defendants." The Bankruptcy Court failed to consider that Rule 37 of the Federal Rules of Civil Procedure also requires notice and hearing. Further, there must be an order with which Appellants' failed to comply . In this case, there was no order, nor was there reason to believe that all discovery had not been complied with; (6) page 4, "Contemporaneous with the entry of the order granting sanctions and default, the bankruptcy court entered a final judgment which found the transfers of the eight parcels of real estate were fraudulent and set aside the transfer of same." Again, it is clear that the bankruptcy court had no jurisdiction over the property that was transferred over a

year prior to the filing of the bankruptcy proceedings; (7) page 5, "In this matter, the record reveals that Appellants had been warned and placed on notice by the bankruptcy court on several occasions that they must comply with Appellee's discovery requests." Although, it is alleged that Appellants had been warned and placed on notice by the bankruptcy court for failure to comply with discovery requests, it is clear that no such order was ever entered, nor did Appellants fail to comply with any discovery request. All documents had been produced, and that Plaintiff's failure to request the copying of such documents was of no fault of the Defendants; (8) page 5, "the bankruptcy court received testimony which revealed that the oral, May 11, 1992, order compelling production of documents had not been complied with by Appellants." Again, there was no Order compelling production of documents. Defendants had simply agreed to assist Plaintiff in the

review of any and all documents requested, to copy same for the Plaintiff. Plaintiff arrived after 5:00 PM, and refused review any requested documents. Defendants fully complied with the agreement made at the May 11, 1992 hearing; (9) page 5, "In this instance, where the bankruptcy court had issued oral warnings to Appellants and where the bankruptcy court found that Appellant "intentionally, repeatedly, and without excuse disobeyed" the bankruptcy court's orders regarding production of documents to Appellee, the bankruptcy court did not abuse its discretion in entering default and entering final default judgment." Again, the Bankruptcy Court did not issue oral warnings to Appellants, nor did the bankruptcy court find that Appellants intentionally, repeatedly and without excuse disobey the bankruptcy court's orders regarding production of documents to Appellee.

SUMMARY OF ARGUMENT

POINT I.

The Default Judgment entered in violation of Rule 55(b)(2) of the Federal Rules of Civil Procedure is void as a matter of law. Rule 55(b)(2) requires that where a judgment by default is sought against a party who has appeared in the action and has filed a responsive pleading, that party shall be served with written notice of the application for judgment at least 3 days prior to hearing on such application, otherwise the judgment is a nullity.

POINT II.

For jurisdiction to attach in which to avoid transfer of properties, said transfers must have been made within a year of the filing of a petition in bankruptcy. Title 11, § 547 of the Bankruptcy Code prohibits the voiding of transfers as shown by sub paragraphs (c)(1)(A), that states: "that which was "intended by the debtor and the creditor to or for whose benefit

such transfer was made to be a contemporaneous exchange for new value given to the debtor; and (B) in fact a substantially contemporaneous exchange; and (2) to the extent that such transfer was (A) payment of a debt incurred by the debtor and the transferee; (B) made in the ordinary course of business or financial affairs of the debtor and transferee; and (C) made according to ordinary business terms."

POINT III.

It appears that the Trustee was without authority to file the adversary complaint as it being in violation of 11 USCS § 348(e) which states in pertinent part:

> "Conversion of a case under Section 706, 1112, 1307, or 1208 of this title [11 USCS Section 706, 1112, 1307, or 1208] terminates the service of any trustee or examiner that is serving in the case before such conversion."

POINT IV.

Rule 37 of the Federal Rules of Civil Procedure is founded on four requisites as

follows: (a) Motion for Order Compelling Discovery; (b) Failure to Comply with Order; (c) Expenses on Failure to Admit; and (d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.

It appears that (b) is the Paragraph upon which the Bankruptcy Court relied when it entered the Order of Default and Default Judgment.

Paragraph (b)(2)(B)(C)(D)(E) specifically states that an Order must be entered prior to the application of sanctions by the Court. No Order exists which would give rise to striking of the Appellants' pleading and the entry of a Default Judgment. Furthermore, notice of the motion is required by Rule 37 which was negated in the case *sub judice*.

POINT V.

Defendants in the adversary proceeding were entitled to a trial by jury as to all

issues so triable. The clear mandate as adopted by Rule 38 of the Federal Rules of Civil Procedure and Interim Rule 9001 of the Bankruptcy Rules governs all requests for jury trials, and as such, permits jury trials for fraudulent conveyance which is an issue at law.

POINT VI.

Rule 37 of the Federal Rules of Civil Procedure requires that an Order has been violated prior to the imposition of sanctions by entering a default and default judgment. It is clear that in absence of a Court Order being violated, the Court is without the inherent jurisdiction to strike pleadings and enter a Default Judgment pursuant to Rule 37.

ARGUMENT POINT I.

THE BANKRUPTCY COURT ABUSED ITS DISCRETION IN ENTERING A DEFAULT JUDGMENT, REQUESTED ORE TENUS AND ENTERED IN VIOLATION OF RULE 55(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE?

The sole basis for the visiting Judge **BOHANON** to grant the Default and Default Judgment was due

to the perjured testimony of **CYNTHIA A. REED, ESQ.**, counsel for the trustee **DANIEL L. BAKST** (Tr. 36-55)(App. 2)(Arg. 4,7,8,28,53). Rule 55(b)(2) of the Federal Rules of Civil Procedure governs the entry of a Default Judgment and reads as follows: "If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with notice of the application for judgment at least 3 days prior to the hearing on such application."

Case law mandates that violation of Rule 55(b)(2) of the Federal Rules of Civil Procedure renders a default judgment void. A default judgment entered without prior notice of hearing would be an absolute denial of due process of law.

In ***Farbar v. Howell***, 105 **Idaho** 57, 665 P. 2d 1067 (1983), an action on deed of trust and promissory note, a default judgment rendered in Plaintiff's favor was void, where Plaintiffs

failed to serve defendant with written notice of application for judgment at least three days prior to hearing. In ***Medeiros v. Hilton Homes, Inc.***, 408 A. 2d 598 (1979 RI), the Court held that when defendant filed its motion to set aside default, it had "appeared" for purposes of rule providing that application for default judgment must be made to court and defendant must be given minimum of *three days'* notice of pendency before entry of default judgment, and thus default judgment obtained without such notice to defendant was void. In ***Harrison v. VMG Bldg. Corp.***, 71 **Mich**. App. 458, 2348 **NW** 2d 584 (1976), it was held that since court rules provided for seven day notice to an appearing party of hearing on application for default judgment was mandatory, and thus, default judgment was invalid and would be vacated, where required notice was not given. It is clear that pursuant to Rule 55(b)(2), prior written notice is mandatory, and as in the case ***sub judice***, no three day notice

was given on application for default judgment since such application was made ore tenus, the judgment is void, or voidable, as a matter of law.

In ***Magness v. Masonite Corp.***, 12 **Ark** App. 117, 671 SW 230 (1984), it was held that failure to give three days notice required on application for default judgment is serious procedural error that justifies reversal of setting aside of default judgment. In ***Daniels Ins. Agency Inc. v. Jordan***, 102 **NM** 162, 692 P. 2d 1311 (1984), it was held that the trial court erred in granting oral motion for default judgment that was made at hearing on motion to vacate or modify arbitration award. Our case is even more serious, in that an ore tenus motion for a default judgment was made at Calendar Call, was a complete surprise to the Defendants, and was made and heard absent the required written three day notice.

Although no contempt order existed regarding production of documents, and, as such,

no punishment should have been entertained by visiting Judge **BOHANON**. It has been held that a judgment by default entered after striking the answer of the defendant from the files is a punishment for his contempt. Even if such contempt existed for refusing to obey an order of the court, it is void for want of due process of law. Although the ore tenus non noticed motion for a default judgment was made at Calendar Call, it was made after the Plaintiff had announced that the parties were ready for trial.

In ***Havaer v. Criston***, 43 **Wis**. 2d 147, 168 NW 2d 81, it was held that to deprive a defendant of the right to make his showing as to the matter urged against him by striking his answer and compelling him to submit to a judgment without a hearing on the merits, is an improper mode of punishment for contempt, and an unconstitutional deprivation of his right to a hearing. ***Foley v. Foley***, 120 **Cal**. 33, 52 P. 122; ***McNamara v. McNamara***, 86 **Neb**. 631, 126 NW 94; ***Farmers' State***

Bank v. State, 13 **Okla.** Crim. 283, 164 P. 132. Due Process of Law includes the right to be heard on the merits.

Although the Defendants were never held in contempt, (nor was an Order ever entered which would give rise to a contempt) the power to deny a hearing to a person in contempt does not include the power to refuse him the right to defend in the main case on the merits. ***McCollum v. Birmingham Post Co.***, 259 **Ala.** 88, 65 So. 2d 689. The mere failure of a party to comply with an interlocutory order without an adjudication that he is in contempt does not, of itself preclude him from being heard in the case. ***Monsen-Sunnegan Ryan Co. v. Placer Syndicate Min. Co.***, 41 NW 525, 71 P. 2d 1034. It is clear that no judgment by default shall be entered if the party against whom judgment by default is sought, has appeared in the action. Nor shall any judgment by default be entered against a party

for contempt without an order of contempt. Again, no order has been disobeyed, and for the Plaintiff to state otherwise, it absolute perjury.

POINT II.

THE BANKRUPTCY COURT DOES NOT HAVE JURISDICTION TO SET ASIDE TRANSFERS OF PROPERTY WHEN SUCH TRANSFERS WERE MADE OVER A YEAR PRIOR TO THE COMMENCEMENT OF THE CHAPTER 11 PROCEEDING AND IN VIOLATION OF TITLE 11, § 547?

Jurisdiction attaches to the Bankruptcy Court pursuant to Title 11 USCS § 541. Pursuant to 11 USCS § 541(a)(1), the interest of the debtor is defined as all legal or equitable interest in the property as of the commencement of the case.

Constitutional, statute and common law principles of long standing operate to protect rights in property. The Bankruptcy Court does not have jurisdiction to regulate or determine the nature or extent of the Defendants' rights when the Defendants are not in bankruptcy nor have consented to the jurisdiction of the

Bankruptcy Court to determine any such rights.

The property by which the Bankruptcy Court usurps jurisdiction over the Defendants was transferred to the proper owners over a year prior to the commencement of the cause in bankruptcy. It is clear that the subject property upon which the trustee made his claim in the adversary complaint was not property of the estate as of the commencement of the case, nor has it ever been the property of the estate.

The Bankruptcy Court has not now nor ever had subject matter jurisdiction over the property held in trust by **SUN** and returned to the proper owners or their assigns over a year prior to the commencement of the case. The Bankruptcy Court failed to consider that when a debtor holds property in trust for the benefits of others, that property is not part of the estate under 11 USCS § 541(a)(1), and (b), and the trustee succeeds only to title and rights the debtor had in property other than that held in trust.

Re Langley, 30 BR 595, 10 BCD 784 (BD ND **Ind.** 1983). In ***Re Shepard***, 29 BR 928 (BC MD **Fla.** 1983), holding that the Trustee succeeds to only such title and rights in property as debtor had at time petition was filed, where debtor holds only bare legal title in property without any equitable interest, bare legal title is all that becomes property of the estate; although trustee acquires bare legal title to the property imposed with constructive trust in favor of another, this interest is of no value to the estate and the trustee is required to recover property to beneficial owner. In the case at bar, **SUN** held in trust property of others as security for certain advances and guarantees. When the security was no longer needed, **SUN** returned the property to the rightful owners. This return of the property was made over a year prior to the filing of the petition and the commencement of the case, as such, it was not held by the debtor at the time of the petition, and was of no value

to the estate or the trustee. In ***Re Depoy***, 29 BR 466 (BC ND **Ind**. 1983), the Court held that the debtor's estate succeeds to no more interest that debtor had, and estate takes its interest subject to conditions under which debtor held interest. In the case *sub judice*, it is clear that at the time of the petition, the debtor had no interest in the subject property, as such, jurisdiction was lacking in both the subject matter and the person.

Indeed, the corporate minutes (App. 1) established that the Debtor held the subject property in trust and that such property was returned to the rightful owners over a year prior to the commencement of the case. Under 11 USCS § 541(d), the debtor's property becomes property of the bankruptcy estate, but not to the extent that another has equitable interest therein. See ***Re Erwin***, 25 BR 363 (BC DC **Minn**. 1982). For the trustee to form a mental image that he can take any property that was not connected to the

estate, is ludicrous and a denial of due process well beyond any legal conception imaginable.

In ***Re Ralph A. Veon, Inc.***, 12 BR 186, (BC WD **Pa**. 1981), in an action to determine ownership of certain bearer bonds, where officers of Chapter 11 debtor purchased bonds with own personal funds and subsequently delivered them to state environmental resources department on behalf of the debtor corporation was that of bailment, thus, when state denied mining permit to debtor and debtor filed for reorganization, officers were entitled to have bonds returned to them. Based on this decision, even if the property had not been returned over a year prior to the commencement of the case, the proper owners would be entitled to the return of the property. In the case at bar, it has been clearly shown that **SUN** has never had a monetary interest in any of the subject properties, nor was there any consideration for the deeding in trust to **SUN**, as such, the return of the properties when

SUN'S exposure had been cured, was the proper and legal function.

28 USCS § 1471, which conferred jurisdiction to the Bankruptcy Court does not grant such jurisdiction to consider any properties that were not that of the debtor prior to the commencement of the case, 28 USCS § 1471(c).

In ***Re S.O.A.W. Enterprises, Inc.***, 32 BR 279 (BC Wd **Tex**. 1983), it was held that 11 USCS § 541(d) applies only to transactions truly within the secondary mortgage market where debtor is mere legal holder of right under deed of trust to mortgage, having transferred all equitable interest and mortgage or deed of trust to third party in business of purchasing mortgages or deeds of trust.

11 USCS § 928, added in 1988, by Public Law 100-597, provides that special revenues acquired by the debtor after the commencement of the case shall remain subject to any lien

resulting from and security agreement entered into by the debtor before the commencement of the case. Not only is the trustee attempting to secure property not of the estate, he is also collecting the rents that belong to parties other than the estate. It is clear that this revenue belongs to others and not the estate or the trustee.

11 USCS § 564(d), added in 1982, by Public Law 97-222, provides that the trustee may not avoid a transfer that is a margin payment, as defined, made by or to a commodity clearing agency, that is made before the commencement of the case. Although the subject property is not a stock transaction, this rule would apply, in that the transfer was made before the commencement of the case.

It is clear that 11 USCS § 547 of the Bankruptcy Code prohibits the voiding of like transfers by a trustee in the 11 USCS § 547(c)(1)(A) in stating that which was "intended

by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and (b) in fact a substantially contemporaneous exchange; and (2) to the extent that such transfer was (A) in payment of a debt incurred by the debtor and the transferee; (B) made in the ordinary course of business of financial affairs of the debtor and the transferee; and (C) made according to ordinary business terms." It is clear that at the time of the transfer, a Chapter 11 filing was never considered and there was no need for any such filing. In order for a proceeding to arise under Title 11, the claims asserted must be predicated on a right created by a provision of Title 11. ***Re Alexander***, 49 BR 733, 13 BCD 47 (BC DC ND 1985); ***Re American Energy, Inc.***, 50 BR 175, 13 BCD 200, BC DC ND 1985). In other words, a proceeding arising under Title 11 is one that would not occur but for a Bankruptcy Code

Provision. ***Re Chargit, Inc.***, 81 BR 243, CCH Bankruptcy Law Report 721153 (BC SD NY).

Chief Justice Burger's synopsis in the Northern Pipeline Case of the plurality's holding has been used as a definition of "related proceedings." The Chief Justice said that a traditional state common-law action, not made subject to a Federal Rule Decision, and related only peripherally to adjudication of Bankruptcy under Federal Law, must, absent to the consent of the litigants, be heard by an Article III Court if it is to be heard by any court or agency of the United States. ***Northern Pipeline Constr. Co. v. Marathonb Pipe Line Co.***, 458 US 50, 73 L. ED. 2d 598 (1982). The practical realities of this situation are clear. The adversary proceeding was not a related one, as such, the issues that involve the conduct of unrelated parties can only be tried in a state law cause of action.

The claims made by the adversary complaint have only exiguous relationship to a Title 11

claim, as such, there exists no Federal Court Bankruptcy jurisdiction. ***Medino-Figueroa v. Heylinger***, 63 BR 572 (DC **Puerto Rico** 1986). There is Bankruptcy jurisdiction only when the dispute is related to the Bankruptcy. Despite the fact that the issues made by the claim are not related to the Bankruptcy, and the transfer was made at a time when the debtor was solvent, in the normal course of business, in no way was it transferred to avoid creditors. Prior to the transfer, **HEMMERLE** satisfied all obligations owed the debtor giving rise for the return of the properties to the assigns of **HEMMERLE**. A review of the Exhibits attached to the Complaint (R. 1) will establish that not only are the claims made by the complaint unrelated, but the issues are non-core as well. Clearly, the nature and extent of the debtor's interest in the property as of the commencement of the bankruptcy, case would be determined by state law if the debtor has an interest. ***Matter of Stage***, 85 BR 880. When a

third party makes a loan to a debtor which enables debtor to satisfy creditor's claim, proceeds of the loan do not become a part of the debtor's estate. In ***Re Air Conditioning, Inc. of Stuart***, 845 F. 2d 293. In the ***Matter of Burkey***, 68 BR 270, the Court held that under Florida law, debtors transferred all their legal and equitable interest in stock certificate before Chapter 11 petitions were filed when debtor endorsed certificates and delivered them to transferee, and thus, stock certificates were not property of the estate as of the commencement of the case, and not subject to turnover provisions of the Bankruptcy Code. Section 678.301(1), 678.307, 678.309, Florida Statutes, and Bankruptcy Code 11 USCS § 101 et seq. The determination of whether mortgage interest in property of investor or bankruptcy estate turns on whether interest has been sold to investor by debtor prior to commencement of case. 11 USCS § 541(d). ***In Re Fidelity Standard Mortg. Corp.***, 839 F. 2d 1517.

The debtor never had an interest in the subject property at the time of the petition for Chapter 11, and ***In Re Parham***, 72 BR 604, it was held that if the debtor's property is subject to a valid, preexisting mortgage or other lien under state law at the time debtor files bankruptcy petition, only debtor's equity in property goes into estate. Since the debtor never had an interest in the property, it will not go into the estate.

The adversary complaint suggest fraudulent conveyance. It is clear that a "fraudulent conveyance" is a transaction through which the owner of real or personal property seeks to place land or goods beyond reach of creditors, or that operates to prejudice their legal or equitable rights or conveyance that operates to prejudice of legal or equitable right of other persons. 11 USCS § 544(b). ***In Re Sperry***, 101 BR 763.

A trustee seeking to recover transfers on constructive fraud theory must prove transfer to defendant of debtor's property, during year

proceeding bankruptcy, while insolvent, without receipt from defendant or reasonably equivalent value in exchange for such transfer. 11 USCS §§ 548(a)(2), 550(a)(1). ***In Re Dugue Rodrigues***, 77 BR 939. Fact that transfer by debtor was for repayment of debt will insulate transferee from liability under 11 USCS § 548 for fraudulent transfer. ***In Re Computer Universe, Inc.***, 59 BR 28.

At oral argument in the Court below, the Appellee argued that although the quit claim deeds shows the transfer being over a year prior to the commencement of the case, the recording was but 13 days prior to the commencement of the case. In ***Hensel v. Aurilio***, 417 So. 2d 1035 (Fla. 4th DCA 1982), the Court held that "Recording has no particular efficacy as between seller and purchaser or grantee since the purpose of the recording statutes is to give notice to third persons of the status of title and related factors. In ***Sweat v. Yates***, 463 So. 2d 306 (Fla.

1st DCA 1984), the Court held that "Deed takes effect from date of delivery, and recording of deed is not essential to its validity as between parties or those taking with notice." And in ***Public Health Trust v. Carroll***, 509 So. 2d 1232 (Fla. 4th DCA 1987), the Court reversed holding that "Recording has no particular efficacy as between seller and purchaser of grantee and grantor since the purpose of recording statutes is to give notice to third persons of the status of title and related factors." Citing, ***Moyer v. Clard***, 72 So. 2d 905 (Fla. 1954); ***Fong v. Batton***, 214 So. 2d 649 (Fla. 3d DCA 1968). By the Plaintiff's own admission that the deeds were dated more than one year before the date of the filing of the bankruptcy proceeding, and were recorded thirteen days before the date of the commencement of the case. Plaintiff relied on 11 USCS § 548, stating that the Bankruptcy Code provides that a transfer is made when that transfer is so perfected that, a bona fide

purchaser from the debtor against whom applicable law permits such transfer to be perfected, cannot acquire an interest in such property of the transferee. A review of 11 USCS § 548 provides that the trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily . . . .:

> (1) made such transfer or incurred such obligations with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted or (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (B)(i) was insolvent on the date that such transfer was made or such obligations was incurred, or became insolvent as a result of such transfer or obligations; (ii) was engaged in business or a transaction, or was about to engage in business or a transaction for which any property remaining with the debtor was an unreasonably small capital; or (iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

In this case, the property was only held in trust by the debtor as security for obligations of the real owners; (2) the property was transferred back to the rightful owners over one year prior to the commencement of the case; (3) the transfer was not made with the actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; (4) the debtor received less that a reasonably equivalent value in exchange for such transfer or obligation; (5) that the debtor was insolvent on the date that such transfer was made or such obligations were incurred, or became insolvent as a result of such transfer or obligation; (6) or that the debtor was engaged in business or a transaction, or was about to engage in a business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or, (7) intended to incur, or believed that the debtor

would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

In order for 11 USCS § 548(d) to apply, § 548 (a)(b)(c) must be shown. Notwithstanding that Appellee failed to show the compliance with such sections, even if they were not mandatory to apply, Appellee failed to show the prerequisites to support the jurisdiction under 11 USCS § 548(d), which states in pertinent part:

> (d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to the perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

POINT III.

THE CHAPTER 11 TRUSTEE DOES NOT HAVE AUTHORITY TO SUCCEED HIMSELF AND FILE AN ADVERSARY COMPLAINT AFTER A CONVERSION TO A CHAPTER 7 PURSUANT TO 11 USCS § 348(e).

On January 14, 1991, the Bankruptcy

Court appointed **DANIEL L. BAKST** as trustee for the estate in the Chapter 11 case. On June 6, 1991, at the request of a trustee, the Chapter 11 case was converted to a Chapter 7 case, and **DANIEL L. BAKST** continued to act as Trustee under Chapter 7. Pursuant to 11 USCS § 348(e) which states in pertinent part:

> "Conversion of a case under section 705, 1112, 1307, or 1208 of this title [11 USCS Section 706, 1112, 1307, or 1208] **terminates** the service of any trustee or examiner that is serving in the case before such conversion." (Emphasis added) (Nov. 6, 1978, P.L. 95-598, Title I, Section 101, 92 Stat. 2568; Oct. 27, 1986, P.L. 99-554, Title II, Subtitle B, Section 257(i), 100 Stat. 3113).

It is clear that conversion of a case terminates the service of any trustee serving in the case prior to conversion. (S. Rept. No. 95-989 to accompany S. 2266, 95th Congress, 2d Session (1978 p. 48.).

Section 348(e) of the House amendment is a stylistic revision of a similar provision contained in H.R. 8200 as passed by the House in

the Senate Amendment. Termination of services is expanded to cover any examiner serving in the case before conversion, as done in H.R. 8200 as passed by the House (124 Congress. Rec. H 11092 (Sept. 28, 1978).

The clear reasoning for Congress to enact this Section was to prevent a Chapter 11 Trustee to convert to a Chapter 7 for the sole purpose of being able to dispose of the debtors property without any recourse and to prevent the trustee from improper sales in which to obtain the percentage of such sales. If the trustee cannot succeed himself, he would have no beneficial purpose for the conversion, and should the conversion be necessary, a new trustee would be appointed in which to prevent an unnecessary conversion.

POINT IV.

RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRES NOTICE AND HEARING PURSUANT TO RULE 55(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Appellee has argued in the District Court that Rule 37 of the Federal Rules of Civil Procedure permits sanctions whenever an order, oral or written has been violated. In the case at bar, no order has ever been violated by the Appellants. Had an order been violated, a Rule to Show Cause would have been issued prior to the entry of a default judgment. Rule 37 of the Federal Rules of Civil Procedure at **F** (b) **Failure to Comply with Order** provides a (2) **Sanctions by Court in Which Action Is Pending**, to wit:

> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claim or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

It is clear that the Appellants neither

disobeyed orders of the Court, nor any order which falls under Rule 37 of the Federal Rules of Civil Procedure. For Rule 37 to apply, Appellants must have disobeyed an order of the Court pursuant to Rule 30(b)(6), 31(a), 35, or 26(f). A cursory review of the record shows no such disobedience or violation of the aforesaid rules. Notwithstanding, that only the violation of the aforementioned Rules would give rise to sanctions pursuant to Rule 37, nowhere can it be found that an order of the Bankruptcy Court was disobeyed.

Furthermore, even if the Appellants disobeyed an order of the Court, which they did not, it would be incumbent upon the Appellee to give notice of the application for a default judgment at least three (3) days prior to a hearing on such a motion. Rule 55(b)(2) of the Federal Rules of Civil Procedure makes it clear that a three day notice is mandatory before a default judgment can be entered in which to give

due process prior to the entry of the default judgment.

Here, the Appellee made an ore tenus motion at Calendar Call for the entry of a default judgment in violation of Rule 55(b)(2) of the Federal Rules of Civil Procedure. There was never willful or malicious misconduct on the part of the Appellants which would justify the entry of a default judgment, nor did the Appellants disobey any order of the Bankruptcy Court. A review of the Court records clearly show that no order existed prior to the entry of the default judgment which would give rise to a default judgment.

In ***The Matter of Sullivan***, 65 B.R. 578 (Bkrtcy, M.D. Fla. 1986), the Court held that the second issue of whether a sanction of dismissal, as sought by Liberty, is appropriate in this adversary proceeding. Rule 37(b) of the Federal Rules of Civil Procedure provides a wide range of sanctions for a party's failure to

comply with discovery, dismissal being the harshest of all. The choice among the various sanctions rests within the discretion of the Court. The structure of Rule 37(b) necessarily suggests that a court should consider lesser sanctions before resorting to dismissal or default. ***In re Rubin***, 769 F. 2d 611, 617 (9th Cir. 1985).

In the District Court's Order Affirming, the Court stated: "In this instance, where the bankruptcy court had issued **oral** warnings to Appellants and where the bankruptcy court found that Appellant "intentionally, repeatedly, and without excuse disobeyed" the bankruptcy court's orders regarding production of documents to Appellee, the bankruptcy court did not abuse its discretion in entering default and entering final default judgment." It appears that the District Court was unaware that no **oral** warning was ever given to the Appellants which was intentionally, repeatedly, and without excuse

disobeyed. It appears that both the visiting judge **BOHANON** and the District Judge chose to believe the argument made by the ore tenus motion, without any proof or written orders showing a disobedience, rather than the argument made by the Appellants that clearly showed no written or conformed order that was disobeyed. Furthermore, the entry of a final default judgment would be a severe sanction to impose for the non production of documents without first the showing that, (1) such documents exists, and (2) that such documents were never produced. Appellee's counsel Ms. Reed, at Calendar Call stated that: "I was presented with what I can only describe as a car, a trolley looking thing, it is about half the size of this desk (indicating), about this deep (indicating), you Honor, about two feet deep, packed in with documents that were just shoved in and they were in no discernible order. I spent approximately five hours in the library of the defendant's

office going through these documents in what turned out to be a vain attempt to find anything in there that was responsive to my three requests for production." (Tr. 40). By the Appellee's own admission, she was presented with a cart full of documents. The documents so presented were all that the Appellants have. Nothing more could have been presented, and full compliance with the motion to produce had been concluded. Since the Appellee failed and refused to copy any of the produced documents, Appellants again agreed to assist Appellee in finding any and all documents in their possession. On May 11, 1992, where the Appellee sought a motion to compel the production of documents, the Court was informed that all document had been produced, and that the Appellee failed to copy any of the documents, notwithstanding that Appellants had agreed to copy any and all documents sought by the Appellee. The Court asked **HEMMERLE** if he would go outside and see if an agreement could be

reached. After the outside agreement, wherein **HEMMERLE** agreed to assist counsel in reviewing the documents and copy any and all she needed which was to be done jointly on May 15, 1992. Counsel for the Appellee showed up at the designated place after 5:00 PM and refused to assist **HEMMERLE** in finding the needed documents. Instead, she handed **HEMMERLE** a list of what she wanted, and left. **HEMMERLE** went through the documents and found certain leases, the minutes of the corporation showing the transfer to the real property, and certain other documents not in conjunction with any matter that could used at trial. **HEMMERLE** copied these documents, but was unable to give them to Appellee since it was the weekend, but delivered them to her on the following Monday, prior to Calendar Call. The Appellants in every way attempted to assist the Appellee in the spirit of cooperation in which to conclude the suit whereby their business could continue.

POINT V.
THE BANKRUPTCY COURT DENIED DEFENDANTS THEIR CONSTITUTIONAL RIGHT UNDER THE SEVENTH AMENDMENT TO THE CONSTITUTION WHEN IT DENIED THEM A TRIAL BY JURY AS TO ISSUES SO TRIABLE.

The Appellee argued against Appellants' right to a jury trial which was founded on the fact that the Defendants' filed a counterclaim to the adversary complaint. A clear mandate as adopted from Rule 38 of the Federal Rules of Civil Procedure and the Interim Rule 9001 of the Bankruptcy Rules governs all request for a jury trial. The only provision which would deny a jury trial by the Bankruptcy Court is set forth in 28 USCS § 1480(B) that states: "The bankruptcy court may order the issues arising under § 303 of title 11 to be tried without a jury. 28 USCS § 1480(a) governs in the case at bar, which states: "Except as provided in subsection (b) of this section, this chapter and Title 11 do not affect any right to trial by jury, in a case under title or in a proceeding arising under Title 11 or arising in or related

to a case under Title 11, that is provided by any statute in effect on September 30, 1979.

It is clear that bankruptcy court denied Defendants' right to a jury trial (Tr. 12-31), and such denial was antagonistic and contrary to the Supreme Court decision in ***Granfinanciera, S.A. v. Nordberg***, 492 U. S. 33, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989).

Appellants made their demand for a jury trial at the time of their answer, affirmative defenses and counterclaim. Although the counterclaim was dismissed by the bankruptcy court, a review of the claim clearly shows that it was a compulsory claim against the trustee and not the estate. Furthermore, the counterclaim consisted of issues which were legal claims and necessarily command the right to a jury trial and were filed as a result of fraud upon the court.

Appellee has never filed a motion to strike Defendants' demand for a jury trial, and, as such, the trial should have been set for a

jury trial. When the Defendants received notice of the cause being tried non-jury, they then filed the motion for clarification and objection to a non-jury trial. The determination of visiting judge **BOHANON** in his denial of Defendants' right to a jury afforded by the Seventh Amendment to the United States Constitution, is clearly in error.

The leading case on the issue of jury trial in bankruptcy is ***Granfinanciera, S.A. v. Nordberg***. 492 U. S. 33, 109 S. Ct. 2782, 106 L. ED. 2d 26 (1989). In ***Granfinanciera***, the trustee filed a suit against various Colombian defendants for the recovery of alleged fraudulent transfers. The Supreme Court considered the issue of whether a creditor who did not file a claim against the bankruptcy estate retained the right to a trial by jury when sued by the trustee to recover an allegedly fraudulent conveyance. ***Granfinanciera*** at 35-38. Ultimately, the Court found that the right to a jury trial was still present. In

arriving at its holding, the Supreme Court first recognized the long standing distinction that the Seventh Amendment protects the right to a jury trial only for matters at law and not for equitable actions. Further, the Supreme court stressed that the labeling of an action as core or noncore does not affect a party's Seventh Amendment right. ***Granfinanciera*** provided that Congress cannot eliminate the right to a jury trial by renaming the traditionally legal action and assigning it to a specialized court of equity. In reaching its holding, the Supreme Court recognized that a consistent but different result occurs when a creditor has filed a proof of claim against the bankruptcy estate. In so doing, the Court reconciled its decision in ***Granfinanciera*** with its holding in the case of ***Katchen v. Landy***, 382 U.S. 323, 86 S. Ct. 467, 15 L. ED. 2d 391 (1966). In ***Katchen***, the Court held with respect to preference actions that by filing a proof of claim a creditor submits the

determination of its rights against the debtor and the bankruptcy estate to the summary jurisdiction of the bankruptcy court in equity.

Commenting on the creditor's Seventh Amendment right, the Court stated:

> "although petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, when the issue arises as part of the process of allowance and disallowance of claim, it is triable in equity".

It is clear that none of the Defendants presented a claim in the bankruptcy proceeding, nor has any Defendant filed a proof of claim as a creditor or submitted the determination of such claimed rights against the debtor or the bankruptcy estate. In ***Granfinanciera***, the Supreme Court emphasized the distinction between a creditor who has filed a claim and one who has not. Discussing the decision in ***Katchen***, the Court stated that its earlier decision turned "on the bankruptcy court's having 'actual or

constructive possession' of the bankruptcy of the bankruptcy estate and its power and obligation to consider objections by the trustee in deciding whether to allow claims against the estate." Here, there is no claim against the estate, and the function of the bankruptcy court over the bankruptcy estate and the claims against it is referred to as the claims allowance process involves the bankruptcy court's equitable determination of a creditor's rights against the estate, there would be no Seventh Amendment right to a jury trial. However, as previously stated, no proof of claim has been filed, and the issues involved in the adversary complaint are issues at law, that is to say, if the jurisdiction is present in which to adjudicate such legal issues. Since the Defendants have not filed a proof of claim, and the Defendants are not creditors of the estate, there is no equity jurisdiction, there remains the Seventh Amendment right to a jury trial.

Subsequent cases have determined that even when filing a proof of claim the right to a jury trial remains inviolate. In ***Re West Coast Video Enterprises, Inc.***, 145 B.R. 484 (E.D. **Pa**. 1990), the Court held, citing ***In Re Brenner***, 119 B.R. 495, 497 (Bankr. E.D. **Pa**. 1990), "We recognize that some of the Debtor's claims are equitable in nature and hence not susceptible to a jury demand, however, the Defendants have not eliminated their right to a jury trial by filing a proof of claim. ***Compare Langenkamp v. Culp***, 498 U.E. 42, 111 S. Ct. 330, 331-32 (Bank. E.D. **Pa**.), aff'd, 132 B.R. 115 (E.D. **Pa**. 1991). An intermingling of issues triable by jury with issues not triable by jury requires that the entire proceeding be tried to a jury, if same is properly demanded. See ***In Re Numedco, Inc.***, 1991 WL 91092, slip op. at 1 (Bankr. E.D. **Pa**. 1991), citing ***Dairy Queen, Inc. v. Wood***, 369 U. S. 469, 477-79, 82 So. Ct. 894, 899-900, 8 L. Ed. 2d 44 (1962); ***Beacon Theatres, Inc. v. Westover***, 359

U.S. 500, 508-11, 79 S. Ct. 948, 955-57, 3 L. Ed. 2d (1959); ***In Re 222 Liberty Associates***, 99 B.R. 639, 645-46, (Bankr. E.D. **Pa**. 1989); and ***5 J. Moore, Federal Practice***, 38.14, 38.16[2], 38.16[4], at 38-149 to 38-158 to 38-159, 38-161 to 38-163 (2d ed. 1991). Hence, following the case law cited herein, the District Court erred by not reversing and permitting a trial by jury.

In ***Petrino v. Eley***, 146 B.R. 267 (D. **Colo**. 1992), the Court held that reference to bankruptcy court would be withdrawn in light of bankruptcy court's inability to conduct jury trials. In so holding, they stated that question of whether cause of action involving bankruptcy matters triggers Seventh Amendment is not dependent on whether Congress classified claims a core or noncore for purposes of bankruptcy court jurisdiction. It further held that Seventh Amendment entitled former Chapter 7 trustee to jury trial on her claims against successor trustee for breach of contract and breach of

trustee duties, and the reference or claims to bankruptcy court would be withdrawn in light of bankruptcy court's inability to conduct jury trial. The claims in ***Petrino*** are similar to Defendants' Counterclaims that were dismissed by the Bankruptcy Court. However, Plaintiff's claims regarding fraudulent transfers, are in fact legal claims which permits a trial by jury if timely demanded.

It was held in ***In Re Frost, Inc.***, 145 B.R. 878 (Bankr. W.D. **Mich.** 1992), that mere fact that creditor filed proof of claim in debtor's Chapter 11 case did not waive any right of debtor to jury trial, since Seventh Amendment would be unconstitutionally abridged by holding that creditor possesses power to waive debtor's right to jury trial. Here we have the same situation in reverse. The Trustee, without even filing a motion to strike defendants' timely demand for a jury trial, attempts to waive defendants' right to a jury trial.

Appellee in their Answer Brief before the District Court argued that the complaint, in order to avoid the transfer of real property, was not a monetary transfer. However, the Appellee did not state that they were attempting to collect all rents paid to the Appellants from the time the debtor transferred the property back to the rightful owners. The rents were, indeed, monetary. A review of the trustee's complaint clearly shows they were seeking rental income from all property transferred.

POINT VI.

RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRES THAT AN ORDER HAS BEEN VIOLATED PRIOR TO THE IMPOSITION OF SANCTION BY ENTERING A DEFAULT AND DEFAULT JUDGMENT.

Where sanctions are permitted pursuant to Rule 37 of the Federal Rules of Civil Procedure, there must be an order which the party sanctioned failed to comply with. Nowhere can there be shown that the Appellants have failed to comply with a Court Order. Where Appellee claims that

the orders were verbal, it is not sufficient to impose sanctions for such alleged non compliance. As set forth in Point IV, there must be an order which was disobeyed. Appellee has failed to produce to the Court any proof that there was disobedience of any order of the Bankruptcy Court.

CONCLUSION

The cumulative effect of: The Bankruptcy Court's error in denying Defendants' motion to dismiss for lack of jurisdiction and entering a default judgment pursuant to Rule 37 of the Federal Rules of Civil Procedure where no disobedience of any order of the bankruptcy court existed; to permit the Trustee to succeed himself in violation of 11 USCS § 348(e); and, denying defendants their right to a jury trial mandates reversal. Based on the case law advanced herein, it is respectfully requested that this cause be reversed with directions correcting the errors set forth in the point presented.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct of the foregoing has been furnished by U. S. Mail to **LESLIE GERN CLOYD, ESQ.**, 2450 Metrocentre Boulevard, West Palm Beach, FL 33402-3948, this _____day of March, 1994.

/s/ K. V. HEMMERLE
808 N.E. Third Avenue
Ft. Lauderdale, FL
(305) 467-6801

/s/ALEXANDER M. SIEGEL
3111 N. Andrews Ave.
Ft. Lauderdale, FL 33309
(305) 564-2700

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 93-5206

In The Matter Of:

SUN-ISLAND REALTY, INC.

Debtor

KENNETH V. HEMMERLE, SR.,
S.I.R. INVESTMENT & DEVELOPMENT,
INC., and KING OF CLUBS, INC.

Appellants,

VS.

DANIEL L. BAKST, as Trustee
for SUN-ISLAND REALTY, INC.,

Appellee.

On Appeal From The United Stated
District Court For the Southern
District of Florida
Honorable Sidney M. Aronowitz

ANSWER BRIEF OF APPELLEE
Daniel L. Bakst, as Trustee
in bankruptcy for Sun-Island Realty, Inc.

LESLIE GERN CLOYD, ESQ.
Florida Bar No. 303305

***Kenneth v. Hemmerle, Sr., et al vs. Daniel L. Bakst, Trustee*, Appeal No. 93-5206**

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned attorney for Appellee, Daniel L. Bakst, Trustee, certifies that the following persons and entities have an interest in the outcome of this case:

Honorable Sidney M. Aronovitz
U.S. District Court Judge
Southern District of Florida

Daniel L. Bakst, as Trustee in Bankruptcy for Sun-Island Realty, Inc.
Appellee

Leslie Gern Cloyd, Esq.
Ackerman, Bakst & Cloyd, P.A.
Attorney for Appellee

Kenneth V. Hemmerle, Sr.
Appellant

King of Clubs, Inc.
Appellant

Alexander M. Siegel, Esq.
Attorney for Appellants, SIR Investments & Development, Inc. and King of Clubs, Inc.

S.I.R. Investment & Development, Inc.
Appellant

STATEMENT REGARDING ORAL ARGUMENT

The Appellee, Daniel L. Bakst, Trustee, does not request oral argument in this case, The issues can be determined from the record and briefs filed, without the necessity of oral argument.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT 2

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over this appeal from the United Stated District Court.

STATEMENT OF ISSUES

I. The Court properly granted Plaintiff's motion for sanctions, and entered default judgment against the Defendants, pursuant to Bankruptcy Rule 7037.

II. The Bankruptcy Court does have jurisdiction to set aside fraudulent transfers pursuant to 11 U.S.C. § 548, and such actions are core proceedings.

III. A Chapter 11 Trustee can be appointed Trustee after conversion to a Chapter 7 case, and as Chapter 7 Trustee, does have standing to bring avoidance action.

IV. The Court was correct in determining that Defendants were not entitled to a jury trial.

STATEMENT OF THE CASE

A COURSE OF PROCEEDINGS AN DISPOSITION IN THE COURT BELOW

Daniel L. Bakst, as Trustee in bankruptcy, filed a complaint in the United States Bankruptcy Court in and for the Southern District of Florida, which was served upon the Appellee as Defendants on August 1, 1991. The Defendants filed an answer on February 3, 1992. The case was set for trial in May 1992. During the course of the lawsuit, the Plaintiffs served numerous discovery request upon Defendants. The Bankruptcy Court entered several order directing Defendants to comply with discovery. The facts relating to these proceedings are more fully set forth under the statement of the facts.

At a hearing on May 18, 1992, the Court entered sanctions against the Defendants, striking all pleadings and entering a default judgment against them. The written order was entered on May 19,

1992. A separate order denying the Defendant's request for jury trial was entered on May 20, 1992. Appellants filed a notice of appeal. The United States District Court entered an order affirming final order and final judgment of Bankruptcy Court on October 27, 1993. The Appellees have appealed that order to this Court.

B. STATEMENT OF THE FACTS

Sun-Island Realty, Inc., filed a Chapter 11 proceeding on September 26, 1990. Daniel L. Bakst was appointed the trustee in Bankruptcy in the Chapter 11 case on January 14, 1991. On June 6, 1991, the case was converted to a Chapter 7 proceeding. The order of conversion continued Daniel L. Bakst as Trustee in the Chapter 7 case.

The plaintiff in the underlying adversary proceeding was the Trustee, Daniel L. Bakst. The defendants below were Kenneth V. Hemmerle, Sr., an insider of the debtor, S.I.R. Investments and development, Inc. and King of Clubs, Inc. The two corporate defendants are both corporations controlled by Mr. Hemmerle. The complaint sought to set aside the fraudulent transfer of eight (8) different parcels of real property. Although the quit claim deeds transferring the eight parcels were dated more than a year before the filing of the bankruptcy, they were recorded only thirteen (13) days before the filing of the bankruptcy

proceeding. As reflected in the complaint, Sun-Island Realty, Inc. listed all parcels of real property on its bankruptcy schedules as being assets of the estate. Approximately one and one-half years, when the Trustee demanded turnover of rental income from these properties, Sun-Island Realty, Inc. amended its schedules and deleted all properties from the list of assets. The alleged consideration for the transfers was a final judgment on appeal, which has since been set aside.

The history of the adversary proceeding shows a pattern of delay on behalf of all defendants. The complaint was served upon all defendants on August 1, 1991. A motion for extension of time to answer was filed on August 21, 1991. Motion to dismiss were by all the defendants, with Mr. Hemmerle filing his on or about 12, 1991 and the corporate defendant filing their motion to dismiss on or about August 26, 1991.

On September 23, 1991, at the pre-trial conference, the Court considered the two motions to dismiss, and entered its order denying motions to dismiss on October 4, 1991. The order directed all defendants to file an answer on or before October 14, 1991, which was twenty (20) days from the date of the hearing. This twenty (20) day deadline was announced at the hearing. The Court further made a ruling that the date of recording of the quit claim deeds controlled, and not the date of execution shown on the document.

The record reflects that the defendants did not file their answer as directed on October 14, 1991, and that the Trustee filed a motion for entry of default judgment on October 23, 1991. The clerk entered a default on October 31, 1991. The defendants filed a motion for rehearing, objections to finding and order, which the Court partially granted on November 13, 91. In that order, the Court gave the defendants until November 30, 1991 to file a responsive pleading.

The defendants ignored this deadline and filed no responsive pleading. On December 17, 1991, the Trustee once again moved for entry of default judgment. That motion was set for hearing on February 3, 1992, at which time defendants finally filed an answer, affirmative defenses and counterclaim, almost three months past their deadline.

Plaintiff filed a motion to strike affirmative defenses and to dismiss counterclaim. The Court entered two orders, one dismissing the counterclaims without prejudice, and one denying the motion to strike the affirmative defenses, both dated April 24, 1992.

The record also reflects the discovery request made by the plaintiff. The plaintiff served three separate requests for production of documents, one to each defendant, on December 17, 1991. Responses were filed by the defendants merely stating that all documents

requested were available for inspection. Although those responses were filed with the Court, they were never served upon the Trustee. Further, notices of depositions were served on all three defendants on January 14, 1992, setting depositions of each defendant for January 21, 1992. None of the defendants appeared, although plaintiff was present with a court reporter.

The above referenced discovery violations were the basis of a motion for sanctions and a motion to compel production of documents from defendants, both filed by plaintiff on or about January 24, 1992. Those motions were also heard by the Court on February 3, 1992, and are the subject of an order entered by the Court on February 28, 1992, holding those motion in abeyance pending compliance by the defendants with the other provisions of that order. That forthwith including the scheduling of defendants depositions, and production of documents previously requested by plaintiff. The Court

further stated that if the defendants failed to cooperate with plaintiff in appearing for depositions or producing documents, then at the pretrial conference, the Court would hear plaintiff's motion for default, motion to compel and motion for sanctions.

The record reflects that the defendants appeared for deposition on March 15, 1992. Plaintiff did not obtain the requested production of documents from defendants, and again filed a motion for contempt, sanctions, and to compel production of documents from defendants, dated April 16, 1992. The motion requested that the Court compel production of documents, hold defendants and counsel in contempt for disobeying Court Orders, that the Court impose sanctions against all defendants, including the striking of pleadings, the entering of defaults, the award of attorneys fees and costs and for such other relief as the Court deemed appropriate. That

matter was heard by the Court on May 11, 1992, as reflected by Court Order entered June 18, 1992. The Court Ordered that defendants produce to plaintiff's counsel all of the documents listed in plaintiff's three requests for production on or before Friday, May 15, 1992.

At the calendar call on May 18, 1992, the Court took testimony on the issue of whether or not the defendants complied with the order Compelling Production of Documents by May 15, 1992. Counsel for the plaintiff, Cynthia A. Reed, testified that some documents had been handed to her in Court the morning of May 18, 1992. She advised the Court that on the afternoon of May 15, 1992, she faxed a letter to Kenneth Hemmerle, advising him that she would be there to pick up the documents within an hour. She arrived at Hemmerle's office shortly before 5:00 p.m.. Mr. Hemmerle still did not have the documents production ready, although he had all week to do

so. Although Kenneth Hemmerle advised the Court that Ms. Reed had agreed to accept the documents on Monday, Ms. Reed disputed that statement, and advised that no such agreement had been made. Further, Ms. Reed testified that the documents received by her the morning of the Court hearing on May 18, 1992 still did not comply with the request for production of documents. The Court found that Ms. Reed was credible, and that the Court file reflected a history of delay. The Court found that the conduct was on the part of Mr. Hemmerle, a named defendant, and principal of the other two corporate defendants, and was not the conduct of any attorney. Therefore, the Court found that the appropriate remedy was to enter a default judgment in favor of plaintiff. The Court stated its findings on the record. The Court entered an order granting plaintiff's motion for sanctions and entering default against defendants on May 19, 1992, pursuant to Federal Rule of Civil Procedure, Rule 37, incorporated

by Bankruptcy Rule 7037. The Court also entered final judgment for plaintiff after default on May 19, 1992.

The defendants filed a motion for clarification and objection to non-jury trial on or about May 12, 1992. The Court denied the motion pursuant to Order entered May 20, 1992. The defendants filed a notice of appeal to the United States District Court concerning "Order Denying Defendant A Trial By Jury Dated May 18, 1992." There was no such order. The notice of appeal to the District Court also refers to the order dismissing defendants counterclaims, undated. The appeal as to that order is untimely, as that order was entered on April 24, 1992. The notice of appeal to the District Court also refers to the order granting plaintiff's motion for sanctions and entering default against the defendants, dated May 19, 1992, and the final judgment for plaintiff after default entered on

May 19, 1992. The United States District Court entered its Order affirming all above Orders of the United States Bankruptcy Court on October 27, 1993.

C. STATEMENT OF THE STANDARD OF REVIEW

POINT I.

The standard of review for this issue is whether the United States District Court abused its discretion.

POINT II.

The standard of review for this issue is whether the United States District Court abused its discretion.

POINT III.

The standard of review for this issue is whether the United States District Court abused its discretion.

POINT IV.

The standard of review for this issue is whether the United states District Court abused its discretion.

SUMMARY OF THE ARGUMENT

POINT I.

The Trustee, as Plaintiff in the adversary proceeding, served requests for production of documents upon the Defendants in December 1991. Hearing were conducted in February 1992 and May 1992 on separate motions to compel filed by Plaintiff. Defendants did not comply with any of these orders, and a default judgment was entered against them on May 19, 1992 pursuant to Bankruptcy Rule 7037.

POINT II.

The Trustee's complaint sought to set aside a fraudulent conveyance of real property pursuant to 11 U.S.C. § 548. Although the date on the deeds were more than one (1) year before the bankruptcy, the deeds were not recorded until shortly before the filing of the bankruptcy proceeding. As to a Trustee in bankruptcy, who steps in the shoes of creditors, the recording

date controls, not the date that is reflected on the deed.

POINT III.

Daniel L. Bakst was appointed Trustee in the Chapter 11 proceeding initially filed by the Debtor. The Order converting the case to Chapter 7 provided that Daniel L. Bakst would continue to serve as Trustee in the Chapter 7 proceeding. There is nothing in the Bankruptcy Code that prohibits a Trustee from serving in both a Chapter 11 proceeding, and later in the converted Chapter 7 case.

POINT IV.

The Trustee's complaint requested that ;the Court set aside transfers of real property, and require an accounting. The Trustee was seeking only equitable forms of relief. The Defendants filed a counterclaim against the Trustee which was dismissed. Under applicable law, the Defendants are not entitled to jury trial under the circumstances of this case.

ARGUMENT

POINT I.

I. The Court property granted Plaintiff's Motion for Sanctions, and entered Default judgment against the Defendants, pursuant to Bankruptcy Rule 7037.

The Bankruptcy Court made findings on the record and in its order granting plaintiff's motion for sanctions and entering default against lthe defendants, which order was entered on May 19, 1992. The Court found that the defendants, through acts and omissions of Kenneth Hemmerle, on his own behalf and on behalf of the two corporate defendants, failed to act in voluntary, good faith compliance with the Federal Rules of Civil Procedure governing discovery, and pre-trial orders entered in the case. The Court further found that the defendants intentionally, repeatedly and without excuse disobeyed the Court's previous orders regarding production of documents to plaintiff. The Court furher found that the defendants' discovery misconduce

constituted sanctionable, dilatory tactics, and that the discovery delays experienced by the plaintiff was wholly caused by the defendants' misconduce. The Court further found that the defendants' non-compliance with discovery rules and Court orders were the direct result of misconduct by the defendants lthemselves, rather than of their counsel. The Court's findings were fully set forth on the record, in open Court.

Based on the above findings, the Bankruptcy Court garnted plaintiff's *ore tenus* motion for sanctions, which reequested relief sought in two prior motions for sanctions filed in the case. The Court considered the various remedies available pursuant to Bankruptcy Rule 7037, which incorporates Rule 37 of the Federal Rules of Civil Procedure. In considering the testimony at the hearing, and the pleadings filed in the adversary proceeding, the Bankruptcy Court imposed sanctions upon the defendants by striking their answers, and entering a default judgment

against all defendants. Rule 37(b)(2)(C) of the Federal Rules of Civil Procedrue, specifically provides that the Court may entere an order striking out pleadings or partrs thereof, or rendering a judgment by default against the disobedient party.

Defendants rely on Rule 55(b)(2) of the Federal Rules of Civil Procedure, but completely ignore Rule 37, which is the basis upon which the Court granted relief to plaintiff. The default judgment in this case was not entered for merely failing to plead. Instead, the Court entered an order striking all plaadings for discovery violations, as specifically provided for under Rule 37. This was no surprise to the defendants, as the plaintiff had raised these discovery wiolations throghtout the case, and defendants were given more than ample opportunity to comply with the discovery request. The defendantw were on notice that the plaintiff's previously filed motion for sanctions would be granted if they

failed to comply with discovery requests. The discovery request were served by plaintiff on Defendant on December 17, 1991. In May 1992, six (6) months later, defendants still had not complied, despite the Court's compelling them to produce documents on at least two separate occasions. Orders were entered on February 28, 1992, and June 11, 1992 reflecting rulings made in open Court at earlier hearings. Despite prior warnings, the defendants failed to comply with the Court's directive on May 11, 1992, to produce all documents by May 15, 1992. The defendants were given an opportunity to testify, through Kennet Hemmerle, at the hearing on May 18, 1992, as to the reason for noncompliance.

The Trustee was entitled, as a matter of law, to have the defendants' pleadings stricken, where defendants had continually failed to comply with the Bankruptcy Court's discovery orders. The defendants provided no justification for failing to produce may of the documents. *In re: Sofro,*

117 B.R. 745 (S.D. Fla. 1990); *In re: Chase & Sanborn Corp.*, 872 F.2d 397 (11th Cir. 1989(,

POINT II.

II. The BAnkruptcy court does have jurisdiction to set aside fraudulent transfers pursuant to 11 U.S.C. § 548. and such actions are core proceedings.

Defendants make much of the fact that the quit claim deeds were dated more than one (1) year before the date of the filing of the bankruptcy proceeding. They ignore, however, the fact that the quit claim deeds were recorded only thirteen (13) days before the date of the filing of the bankruptcy proceeding.

The Trustee filed suit to set aside the transfer of the real property within one (1) year of the filing of the bankruptcy proceeding, pursuant to 11 U.S.C. § 548. The Bankrupcty Cose provides, pursuant to § 548(d), that a transfer is made when that transfer is so perfected that a bonafide purchaser from the debtor against whom applicable law permits such transfer to be

perfected cannot acquire an interest to the property transferred that is superior to the interest in such property of the transferee. See also, *In re: Rubin*, 12 B.R. 436 (S.D.N.Y. 1981).

The adversary proceeding seeks to set aside a fraudulent transfer, and requests turnover of property of the estate. Both of these matters are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(E),(H). Thus, Appellants' statement that the Trustee's action was not a core proceeding is simply not correct. Further, these matter were all raised at the hearing on defendants' motion to dismiss, which was denied at the hearing that took place on September 23, 1991. The Order denying the motions to dismiss entered October 4, 1991, was never appealed. Further, pursuant to Florida Statute § 695.01, no conveyance shall be good and effectual in law or equity against creditors or subsequent purchasers for valuable consideration and without notice, unless that conveyance is recorded according to

law. The cases cited by Defendants stating that the conveyance is good as between the parties is not relevant to the issue as to whether it is good as to a Trustee in bankruptcy. As to a Trustee, the date of recording controls.

The Bankruptcy proceeding was originally filed in September 1990. The initial bankruptcy schedules listed all real properties transferred as property of the estate. It was not until eighteen (18) months later that the debtor, through its principal, Kenneth Hemmerle, amended the schedules to delete all real property. This was prompted by various matter occurring in the Bankruptcy court concerning collections of rent. This allegation is made in the Trustee's complaint.

It is clear that the Bankruptcy Court does have jurisdiction over avoidance actions arising under 11 U.S.C. § 548. Even if the transfers did take place more than (1) year before the filing of the bankruptcy proceeding, the Bankruptcy Court would

have jurisdiction under 11 U.S.C.§ 544.

The schedules filed in the bankruptcy proceeding, together with the claims filed by creditors, indicate the number of creditors in the bankruptcy proceeding. The Trustee does not have to allege that he is a creditor in the case, to avoid a transfer pursuant to 11 U.S.C. § 548. The Trustee's complaint alleges a cause of action to set aside fraudulent conveyances. The defendants' pleadings were stricken, and default entered, based on the record of delay and dilatory tactics in the bankruptcy proceeding. Every element of § 548 is pled in Plaintiff's complaint, which set forth a *prima facia* cause of action to avoid the transfers of real property. The cases cited by appellants do not support the relief sought, and are inapplicable to the facts of this case. It is too late to raise jurisdictional matters at this point, and even if the Court does consider the jurisdictional arguments, they are without merit.

POINT III.

III. A Chapter 11 Trustee can be appointed Trustee after conversion to a Chapter 7 case, and as Chapter 7 Trustee, does have standing to bring avoidance actions.

It is undisputed that Daniel L. Bakst was appointed Trustee in the Chapter 11 proceeding on January 14, 1991. Subsequently, on June 6, 1991, the case was converted to a Chapter 7 proceeding. That same order provided that Daniel L. Bakst continue as trustee in the Chapter 7 proceeding.

Appellant misconstrues the meaning of 11 U.S.C. § 348(e). This code provision merely states that conversion of a case in a Chapter 7 proceeding terminates the service of any then serving trustee. It certainly does not provide that the Trustee cannot be reappointed in the Chapter 7 proceeding. (Colliers 15th Ed. § 348.06). In fact, it is common practice for the Court to reappoint a trustee after conversion, as that trustee is already familiar with the case. The Trustee would further state that this point was

not raised in the lower court, and is not properly an issue on appeal. The relief sought should be denied for this additional reason.

POINT IV.

IV. The Court was correct in determining that defendants were not entitled to a jury trial.

The defendants filed a counterclaim against the Trustee, which the Bankruptcy Court denied without prejudice. This counterclaim was not filed until February 3, 1992, only after the plaintiff moved for default for the second time. The request for jury trial was untimely, and was not brought to the attention of the Court until the filing of the motion for clarification and objection to non-jury trial on May 12, 1992, only one week before trial. That motion cites ***In re: Harbour***, 840 F.2d 1165 (4th Cir. 1988), remanded 109 S.CT. 3234 (1989). The Supreme Court remanded that case for further reconsideration in light of ***In re: Granfinanciera, S.A.***, 109 S.Ct. 2782 (1989).

Appellants' motion for clarification correctly summarizes the Supreme Court's decisions, in stating that a person sued by a Trustee in Bankruptcy to recover an allegedly fraudulent monetary transfer is entitled to a jury trial, as long as such person has not submitted a claim against the bankruptcy estate.

Appellants were not entitled to a jury trial for two separate reasons. First of all, they filed a counterclaim against the trustee, which is tantamount to a claim. Second of all, the Trustee was to avoid the transfer of real property and not a monetary transfer. The Court in ***Granfinanciera*** found that in that case, the demand was purely monetary, and that the plaintiff had not requested an accounting or other specifically equitable form of relief. To the extent that a trustee seeks to avoid the transfer of land, or needs equitable aid for an accounting, he may invoke the equitable process, and the defendants are not entitled to jury

trial. See ***Granfinanciera*** at 2790-2793. It is clear that a claim under bankruptcy law includes virtually all legal and equitable rights to payment and is broadly construed. A counterclaim filed in a fraudulent conveyance action, submits the defendants to equitable jurisdiction of the Bankruptcy court. ***Bayless vs. Crabtree,*** 108 B.R. 299 (W.D.Oki. 1989), aff'd 930 F.2d 32 (10th Cir. 1991). The fact that the counterclaim was filed against the Trustee only in response to an adversary proceeding, does not alter the fact that it is a claim, and that it does submit the defendant to the equitable jurisdiction of the Court. ***In re: Kaiser Steel Corp.,*** 109 B.R. 968 (D. Colorado 1989). Defendants in this case have not been improperly denied their right to a jury trial. Appellants' brief does not give any basis to set aside the decision of the Bankruptcy Court's finding that they were not entitled to a jury trial, which was affirmed by the U.S. District Court.

CONCLUSION

The United States District Court was correct in entering its Order Affirming Final Orders and Final Judgment of Bankruptcy Court. This decision was correct in all respects and should be affirmed on appeal.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing ;has been furnished by regular mail to **KENNETH V. HEMMERLE, SR.**, 808 NE Third Avenue, Fort Lauderdale, Florida 33304, and **ALEXANDER M. SIEGEL, ESQ.**, 3111 No. Andrews Avenue, Fort Lauderdale, Florida 33304 on this *2nd* day of May, 1994.

ACKERMAN, BAKST & CLOYD. P.A.
Attorney for Trustee/Appellee
P.O. Drawer 3948
West Palm Beach, FL 33402

/s/ Leslie Gern Cloyd, Esq.
LESLIE GERN CLOYD, ESQUIRE
Florida Bar No. 303305

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In the Matter of:

SUN-ISLAND REALTY, INC.,

Debtor. CASE NO. 90-26885-BKC-AJC

_____/

DANIEL L. BAKST, Trustee,

Plaintiff,

-VS- ADV. NO. 91-0658-BKC-AJC-A

KENNETH V. HEMMERLE, SR.;
S.I.R. INVESTMENT &
DEVELOPMENT, INC., and
KING OF CLUBS, INC.,

Defendants.

_____/

ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM

Defendants, **S.I.R. INVESTMENT & DEVELOPMENT, INC and KING OF CLUBS, INC.** (hereinafter **SIR & KOC HEMMERLE**") by and through their undersigned attorney, files this their Answer, Affirmative Defenses and Counterclaim to Plaintiff's Adversary Complaint, and answers as follows:

1. Except as hereinafter admitted, qualified or otherwise answered, **SIR and KOC** denies each and every allegation, matter and thing that would or could state a cause of action as to the allegations set forth in Plaintiff's Complaint, and each and every part and portion thereof.

2. **SIR & KOC**, denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 5 and 6 of the Complaint and as such are denied.

3. **SIR & KOC** admits paragraph 4 and that part of paragraph 5 which states that composite **Exhibit "A"** shows the legal descriptions of the properties transferred by Quit Claim Deeds, and that the grantor on each parcel is **SUN-ISLAND REALTY, INC.**

4. **KOC & SIR**, denies the allegations contained in paragraphs 1, 2, 3, 7, 8 and 9 of the Complaint.

5. **SIR and KOC**, lacks information or belief

sufficient to respond to paragraph 10 of the Complaint in that is appears to be a prayer for relief, and as such is denied.

AFFIRMATIVE DEFENSES

SIR & KOC hereby asserts the following Affirmative Defenses to the whole of Plaintiff's Complaint, and alleges:

6. **ESTOPPEL:** **SIR & KOC** affirmatively alleges that Plaintiff is estopped from bringing this action in that the transfer, accounting and turnover cannot be a valid claim on matters that transferred one year prior to the filing of the Bankruptcy Petition.

7. **LACK OF JURISDICTION:** **SIR & KOC** affirmatively alleges that the Court has no jurisdiction over **SIR & KOC** or over the subject property of this action, for the reason that said property are not, and never have been, in the possession or under the control of this court, and the lawful owner of such property is that other than the debtor or trustee, and **SIR** and **KOC**

does not consent that the Court shall have jurisdiction of the controversy arising upon the trustee's adversary complaint, and the answer of **SIR & KOC** thereto, and further alleges that the only remedy of the Trustee in the premises is by plenary suit against **SIR & KOC** in either the State Court or the United District Court for the Southern District of Florida.

8. **FRAUD:** **SIR** and **KOC** affirmatively alleges that each and every allegation contained in Plaintiff's Complaint is based upon fraud and deceit, in that the ex parte conversion of debtor **SUN-ISLAND REALTY, INC.** from Chapter 11 to Chapter 7 by the Plaintiff **BAKST**, was without notice or hearing, contrary to the provisions of 11 USCS Section 342, and was a fraudulent act in which to give rise to this adversary proceeding. For Plaintiff **BAKST** to submit an ex parte order of conversion five days after this Court's denial of such conversion, after full hearing on the matter of conversion, is in fact fraud upon the

Court. Further, Plaintiff, as Trustee, in his motion to convert, alleged untrue statements that could have been refuted had a proper hearing been had on the motion.

9. **CHAMPERTY:** **SIR & KOC** affirmatively alleges that Plaintiff, **BAKST** by the ex parte motion and submission of the Order of conversion to Chapter 7 without hearing, was for the sole purpose to protract this litigation, and with full knowledge that neither the Trustee or the Debtor has any interest in the property that forms the subject matter of this action, and it appears that the Plaintiff, **BAKST** has paid all expenses and costs of this action to be recovered from the debtor, and from whatever assets over which he now controls. A conveyance pursuant to a contract entered into over one year prior to the filing of the Chapter 11 Petition, is absolute, and any attempt to allege a fraudulent transfer and file an adversary proceeding, carrying all expenses for such

action, is in fact Champerty. All facts regarding the covenants sued on herein, were well known to Plaintiff, **BAKST** prior to the time of the filing of this suit.

10. **ABUSE OF PROCESS: SIR** and **KOC**, affirmatively alleges that Plaintiff **BAKST**, maliciously and without probable cause, filed this action with the full knowledge that the subject property transferred, was transferred over a year prior to the Chapter 11 filing by **SUN-ISLAND REALTY, INC.**, and as such, is an Abuse of Process.

11. **UNCLEAN HANDS: SIR** and **KOC** affirmatively alleges that Plaintiff, **BAKST'S** Complaint is barred by the doctrine of unclean hands.

WHEREFORE, having fully answered, Defendant, **SIR** and **KOC** prays judgment that Plaintiff, **BAKST** take nothing by his Complaint, and that **SIR** and **KOC** be dismissed with Defendants' costs of suit. **SIR** and **KOC** demands trial by jury as to all issues so triable.

COUNTERCLAIM

Defendants' **SIR** and **KOC** having answered Plaintiff, **BAKST'S** Complaint, now files their Counterclaim and allege:

FACTUAL INTRODUCTORY ALLEGATIONS

12. On the 29th day of September, 1989, certain properties titled in fee to **SUN-ISLAND REALTY, INC.**, was transferred by Quit Claim Deed to either **SIR or KOC**, or (Copies of such transfers are attached to Plaintiff's Complaint as ***Exhibit "A"***).

13. Each of the properties transferred, was in fact transferred to the designated and proper owner, in that such properties were held in trust by **SUN-ISLAND REALTY, INC.** and held for the repayment of certain loans and guarantees.

14. That the properties transferred by Quit Claim Deed to the rightful owners, were transferred on the 29th of September, 1989, approximately a year prior to the September 26, 1990 filing of the Chapter 11 proceeding.

15. That valuable consideration was given for the return of such properties to the rightful owners.

16. That without notice or hearing, the matter of **SUN-ISLAND REALTY, INC.** was converted from a Chapter 11 proceeding to a case under Chapter 7, ex parte, notwithstanding, that a denial of such conversion had been denied by the Court following proper notice and hearing.

17. That the ex parte conversion order was never furnished to **SUN-ISLAND REALTY, INC.** or its counsel, nor any other creditor which had an ownership interest in the assets of the debtor, and as such, all parties in interest was prevented from requesting rehearing, or appealing such conversion.

18. The debtor **SUN-ISLAND REALTY, INC,** first became aware of the Chapter 7 conversion when Trustee **BAKST** prevented a jury trial in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, in Case

BEST AVAIL

No. 86-6688-CL (AA), on May 21, 1991. On that date, Trustee **BAKST** informed the **Honorable EDWARD RODGERS**, that as trustee, he would not permit the trial to go forward, and that the debtor had been converted to Chapter 7 which he, as trustee controlled all collection procedures, and would not permit this collection to be tried by jury.

19. Following the knowledge that the Chapter 11 debtor had been converted to Chapter 7, by order of the Board of Directors for debtor **SUN-ISLAND REALTY, INC.**, Defendant **HEMMERLE** filed a Motion for Rehearing and/or Reconsideration of the Conversion to Chapter Seven, together with a Motion for Termination of Trustee's Appointment. The Motions were scheduled to be heard on the 10th day of June, 1991, at 9:30 a.m. At this hearing, Trustee **BAKST** objected to **HEMMERLE'S** motions on the grounds that he was not licensed to practice law in the State of Florida, and as such was not permitted to move the Court on any matter

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regarding a corporation, and that the debtor was in fact a Florida corporation. Although, Trustee **BAKST** objection was proper, and that the Court properly sustained the objection, counsel for debtor **SUN-ISLAND REALTY, INC., WILLIAM McPHARLIN, ESQ.** informed the Court that he would adopt **HEMMERLE'S** Motions. The Court permitted the adoption, but instructed counsel **McPHARLIN** to re-notice the adopted motions of **HEMMERLE**.

20. Since the Order in open Court for counsel **McPHARLIN** to renotice the motion for Rehearing and/or Reconsideration of Conversion to Chapter seven, and the motion for Termination of Trustee's Appointment, there has been a substitution of counsel for the debtor **SUN-ISLAND REALTY, INC.**, such substitution placed counsel **RICHARD G. DOGGETT** as new counsel of record for the debtor.

21. On information and belief, and pursuant to the instruction of the Court, at hearing on

HEMMERLE'S motion to dismiss, whereby the Court instructed **HEMMERLE** to inform new counsel **RICHARD G. DOGGETT** to set for hearing the adopted motions of **HEMMERLE** for the purpose of concluding and finalizing the Chapter 7 conversion.

22. On information and belief, at this same hearing, the Court instructed **CYNTHIA A. REED, ESQ.**, counsel for Trustee **BAKST** to reschedule the conversion hearing in which to afford argument by the debtor. As of the date of this pleading, the conversion hearing has not been rescheduled.

23. On or about the 26th day of July, 1991, Plaintiff, **BAKST** as Trustee, filed the Complaint herein, with the full knowledge that the conversion was improper; that the conversion was not finalized until such time as the rehearing had been disposed of. Further, **BAKST** sought this conversion notwithstanding that all creditors have been granted relief from stay by stipulation and/or agreed order, save the

unsecured creditors that have an interest in the debtor or by loans from relations of shareholders of the debtor.

24. Plaintiff'**BAKST'S**, Complaint herein, was filed with full knowledge that the ex parte motion to convert also contained untrue statements that would have been refuted by the debtor and creditors had they been given notice of hearing on such conversion.

COUNT I.
ABUSE OF PROCESS

25. **SIR** and **KOC**, realleges and incorporates the factual allegations contained in paragraphs 12 through 24 as their paragraph 25 and alleges further.

26. On or about September 23, 1991, Plaintiff, Trustee **BAKST** filed the Complaint herein, alleging Fraudulent Transfers, and for Accounting and Turnover.

27. The Complaint was filed by **BAKST** with the full knowledge that this Court has no

jurisdiction over either **KOC** or **SIR**, and no jurisdiction over the subject property or any proceeds derived from rental on the subject property, for the reason that said property and the proceeds thereof are not, and never have been, in the possession or under the control of this Court, and the deed holders of the subject property are the lawful owner thereof.

28. Although, little or no proceeds or income has been received by the deed holders of the subject property, and such proceeds are less that the cost of maintenance; the debt service and taxes and insurance. The income and proceeds from all properties are less than $10,000.00 per month, the debt service is more than $100,000.00 per month; Insurance at $10,000.00 per month; Taxes at $11,000.00 per month, and maintenance at $8,000.00 per month, for a loss of $129,000.00 per month.

29. At the time Trustee **BAKST** filed this Complaint, he well knew that the Court was

without jurisdiction over **SIR** and **KOC** or the subject property.

30. As a result of the filing of the false Complaint there was a malicious perversion of a regularly issued process, whereby a result not lawfully attainable under it can be secured, and as such was and is an illegal, improper and perverted use of process.

31. The process originated herein by **BAKST**, is and was willful and intentional, and used for a purpose not justified by law, and used for the sole purpose of his own personal pecuniary benefit, and is a malicious perversion of a regularly issued process whereby a result not lawfully or properly obtained can be secured. **BAKST**, at all times herein, had an ulterior motive in which to extort funds from either **SIR**, **KOC** or **HEMMERLE** as the rightful deed holders of the property that forms the subject of this action. Further, **BAKST** has and had full knowledge that the allegations contained in the Complaint

were and are untrue, thus, is a threat not authorized by said process and is aimed at an objective not legitimate in the use of process.

32. **BAKST**, by the filing of the Complaint, is guilty of gross and willful oppression, and without regard to **SIR** or **KOC'S** rights, acted wrongfully, maliciously and with the intent to vex, harass and annoy, without any just or probable cause, and by reason thereof, **BAKST** should be punished, and as such **SIR** and **KOC** are entitled to punitive damages upon a showing of an evidentiary basis in the amount of $100,000.00.

WHEREFORE, **SIR** and **KOC**, pray this Court award punitive damages upon a showing of an evidentiary basis in the amount of $100,000.00, costs of this action and reasonable attorney's fees and for such other and further relief as the Court deems right and proper. **SIR** and **KOC** demands trial by jury as to all issues so triable.

COUNT II.
VIOLATION OF CHAPTER 771 ET. SEQ.
FLORIDA STATUTES

33. **SIR** and **KOC** reallege the factual allegations contained in paragraphs 12 through 24 as their paragraph 33 and allege further.

34. This Count is brought pursuant to Florida Statute Chapter 771 et seq. titled "Civil Remedies for Criminal Practices".

35. **SIR** and **KOC** have been, and will be injured pursuant to Section 772.11 Florida Statutes, by reason of **BAKST'S** violation of Section 812.014 Florida Statutes, by knowingly obtaining or uses, or endeavors to obtain or to use, the property of **SIR** and **KOC** with intent to, either temporarily or permanently: (a) Deprive **SIR** or **KOC** of the right to the property or a benefit therefrom; and (b) Appropriate the property to his own use or to the use of any person not entitled thereto.

36. The subject property of this action has a value in excess of $100,000.00, and as such **BAKST**

is guilty of grand theft in the first degree, and punishable as a felony of the first degree, as provided in Sections 775.082, 775.083, and 775084 Florida Statutes.

37. By reasons of **BAKST'S** violation of Section 812.014 Florida Statutes, **SIR** and **KOC** have been damaged to a value in excess of $100,000.00 for which **SIR** and **KOC** claims entitlement to triple damages as provided by Section 772.11 Fla. Stat.

WHEREFORE, SIR and **KOC** demands judgment for damages in the amount of $100,000.00, and for threefold of the amount sustained, together with prejudgment interest, costs and attorney's fees and such other and further relief as the Court deems right and proper. **SIR** and **KOC** demands trial by jury as to all issues so triable.

COUNT III.
FRAUD AND FRAUD UPON THE COURT

38. **SIR** and **KOC**, reallege the factual allegations contained in paragraphs 12 through 24 as their paragraph 38 and allege further.

39. On or about September 23, 1992, **BAKST**, falsely and fraudulently, and with the intent to deceive and defraud **SIR** and **KOC** and this Court, filed an adversary complaint alleging that **HEMMERLE**; **S.I.R.** and **KOC** created a fraudulent transfer, and further alleging that **HEMMERLE** is the principal of the debtor and is, therefore, an insider. This allegation to totally untrue, and constitutes fraud upon the Court, in that **BAKST** obtained information by deposition that **HEMMERLE** was only an employee of the debtor, and as such was and is not an insider.

40. Next, **BAKST** alleges that the two corporate defendants, **S.I.R. and KOC**, are both corporations controlled by **Kenneth Hemmerle, Sr.** and that these corporations are also insiders. **BAKST'S** representations in regard to **HEMMERLE** being the principal of the debtor and an insider were false and were known by **BAKST** to be false, that in truth and in fact, **BAKST** well knew that **HEMMERLE**

was only an employee of the debtor. **BAKST'S** representations that **S.I.R. and KOC**, were insiders of the debtor is also false and known by **BAKST** to be false, when in truth and in fact, the **KOC**, was a corporation formed prior to the formation of the corporate debtor, and as such could not be an insider.

41. Next, **BAKST'S** representation that the transfers of the subject property took place just thirteen (13) days before the filing of the bankruptcy proceeding, this representation is also false and known by **BAKST** to be false. In truth and in fact the transfers of the subject property took place on September 29, 1989, and the filing of the bankruptcy proceeding took place in September 26, 1990, a year later.

42. Although, the appointment of **BAKST** as Trustee was unknown to the debtor or the shareholder of the debtor at the time of such appointment, the appointment of **BAKST** was not for the purpose of defrauding creditors or the

debtor's shareholders, but for the purpose of representing the estate, and since the creditors are, in certain respects, the beneficiaries of the estate, the fraud perpetrated by **BAKST** affects not only the shareholders but the creditors as well.

43. The appointment of **BAKST** by the Court was based upon the duties of a trustee as a normal and honest business relationship between the debtor and its creditors. Had the Court been aware of the fraudulent and dishonest scheme concocted to extract funds from the estate or business relationship of the estate, it would not have appointed **BAKST** as trustee.

44. Pursuant to the aforesaid fraudulent scheme devised by **BAKST**, and neither the debtor **SUN-ISLAND REALTY, INC.**, **SIR**, **KOC** or **HEMMERLE** being aware of the fraudulent act of conversion from Chapter 11, to Chapter 7, in which to control the assets of the debtor, which knowledge **SIR**, **KOC**, **HEMMERLE** and **SUN-ISLAND REALTY, INC.**

were prevented from obtaining by the fraudulent plan of concealment agreed upon, devised, participated in, and carried out by the Trustee **BAKST**; the debtor, the Court and **SIR**, **KOC** and **HEMMERLE** relying upon the appearance of honest and normal trusteeship, and with the understanding that as trustee **BAKST** would fulfill his fiduciary duties to the estate of the debtor, its shareholders and creditors, and to act in the best interest of the ongoing business interest of the estate and its shareholders and creditors, the Court permitted **BAKST** to remain as the appointed Trustee.

45. By reason of the premises, the acts done by **BAKST** as hereinabove set forth were intentional and done with malice for the sole purpose of obtaining control of the assets of the debtor and to dispose of such assets in a manner that harms the estate as well as its creditors, and the false and fraudulent representations made by **BAKST** in his adversary complaint are made

with the actual knowledge of said falsity and, all of which was done deliberately and with actual malice and the intent to deceive **SIR**, **KOC**, **HEMMERLE** and the Court.

46. Trustee, **BAKST** perpetrated a fraud upon the Court, said fraud being collateral to the issues set forth by **BAKST** in his adversary complaint in which to prevent a fair submission of the controversy to the Court.

WHEREFORE, **SIR** and **KOC** pray this Court award actual damages for slander of title of **SIR** and **KOC'S** interest in the real property that forms the subject of this suit due to fraud and fraud upon the Court, in the amount of $100,000.00, and for punitive damages threefold of the amount sustained upon the showing of an evidentiary basis, together with prejudgment interest, costs and attorney's fees and for such other and further relief as the Court deems right and proper. **SIR** and **KOC** demands trial by jury as to all issues so triable.

COUNT IV.
INTENTIONAL AND UNJUSTIFIED INTERFERENCE WITH AN ADVANTAGEOUS BUSINESS RELATIONSHIP

47. **SIR** and **KOC** reallege the allegations contained in paragraphs 12 through 24 as their paragraph 47 and alleges further.

48. **SIR** and **KOC** have been damaged and are continuing to be damaged as a proximate result of intentional and unjustified interference with the business relationship of the debtor, **SIR**, **KOC** and **HEMMERLE**.

49. **BAKST** by the herein adversary complaint has interfered with the ongoing business relationship between **SIR**, **KOC** and **HEMMERLE**, and as such prevented the sale, lease, and development of the properties alleged by **BAKST'S** fraudulent claim as to the transfers of the real property, and has on its face interfered with such business relationship.

50. **SIR** and **KOC** have been damaged as a result of the aforesaid interference, thereby causing **BAKST** to be liable for any and all

damages resulting therefrom.

WHEREFORE, **SIR** and **KOC** demands judgment against **BAKST** for compensatory damages in the amount of $1,000,000.00, punitive in the amount of $100,000.00, costs, and for such other relief as the Court deems right and proper. **SIR** and **KOC** demands trial by jury as to all issues so triable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to counsel for **BAKST** attending hearings in this cause and others, at Fort Lauderdale, Florida on February 3, 1992.

RICHARD G. DOGGETT, P.A.
808 Northeast Third Ave.
Fort Lauderdale, FL 33304
Telephone: (305) 767-9055

By/s/ Richard G. Doggett

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 93-5206

D. C. CASE NO.: 92-6935-CIV-ARONOVITZ

KENNETH V. HEMMERLE, SR.,
S.I.R. INVESTMENT & DEVELOPMENT,
INC., and KING OF CLUBS, INC.

Appellants,

versus

DANIEL L. BAKST, as Trustee

Appellee.

REPLYBRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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STATEMENT OF ISSUES

I.

Bankruptcy Rule 7037 does not permit the Court to grant Plaintiff's ore tenus motion for a default and default judgment where no order of the Court has been violated.

II.

The Bankruptcy Court is without jurisdiction to vacate or set aside transfers which were made over a year prior to the commencement of the bankruptcy proceeding, and, as such, cannot be a core proceeding.

III.

The Chapter 11 Trustee does not have authority to succeed himself after a conversion to Chapter 7 pursuant to 11 USCS § 348(e).

IV.

The Seventh Amendment to the United States Constitution provides for a trial by jury as to A-234 all issues at law.

Appellant's Point IV and Point VI of his Initial Brief has not been addressed by the Appellee in the Answer Brief, as such, Appellant need not respond.

REPLY TO APPELLEE'S STATEMENT OF THE CASE

Appellant disagrees with the Appellee's Statement of the Case to the extent that it is inaccurate. Therefore, Appellant finds it necessary to make the corrections to that portion of Appellee's Statement of the Case, to correctly inform the Court that Appellee's assertion, that the Bankruptcy Court entered several orders directing Defendants to comply with discovery is inaccurate. Nowhere can it be found in the record that Appellants failed to comply with an order of the Bankruptcy Court. Appellee has failed to support this contention by reference to the volume, document number and page number of the original record where the matter relied upon is

to be found. By virtue of requirements set forth in 11th Cir. R. 28-2(h), it is clear that Appellee's Statement of the Case does not comply with this Court's requirements set forth in Rule 28-2(h).

REPLY TO APPELLEE'S STATEMENT OF THE FACTS

Appellants disagrees with Appellee's Statement of the Facts to the extent that certain facts are incorrectly stated. Therefore, Appellants finds it necessary to supplement Appellee's Statement of the Facts.

Appellee's alleges that **SUN-ISLAND REALTY, INC.** listed all parcels of real property on its bankruptcy schedules as being assets of the estate. Original counsel for **SUN-ISLAND REALTY, INC.**, was not a bankruptcy attorney, and made the schedules based on a financial statement provided to him by the debtor. Although this financial statement clearly showed that the property was held in trust by **SUN-ISLAND REALTY, INC.**, it was erroneously

deleted from the schedules. However, the consideration for the return of the of the property was in fact shown on the schedules.

Appellee's Statement of the Facts next alleges that "approximately one and one-half years later, when the Trustee demanded turnover of rental income from these properties, **SUN-ISLAND REALTY, INC.** amended its schedules and deleted all properties from the list of assets. Again, this assertion is in error. The correction was made within six months of the commencement of the petition, and was corrected prior to any demand of turnover of rental income made by the Trustee. When **SUN-ISLAND REALTY, INC.**, retained new counsel who was a bankruptcy attorney and had knowledge of the mistaken schedules, he promptly made the corrections.

Next, the Appellee states that the history of the adversary proceeding shows a pattern of delay on behalf of all defendants. Again, this

statement is in error. A review of the record will show that each and every continuance sought, was sought by the Plaintiff and not by the Defendants. Where the Appellee seeks to allege that Defendants' Motion to Dismiss shows a pattern of delay, is without any merit whatsoever.

Appellee next contends that on September 23, 1991, at the pre-trial conference, the Court considered the two motion to dismiss, and entered its order denying the motions on October 14, 1991. On October 28, 1991, the Appellants first received the conformed order denying Defendants motion to dismiss. Immediately thereafter, Defendants filed a Motion for Rehearing and Objection to Findings and Order (See Record Excerpts No. 5). Pursuant to the mandate of the Order denying Defendants Motion to Dismiss, the Plaintiff **DANIEL L. BAKST** was obligated to immediately upon receipt of the signed copy of the order

mail conformed copies to **KENNETH V. HEMMERLE, SR.**, and **RICHARD G. DOGGETT, ESQ.** Plaintiff failed to supply conformed to counsel for the corporate defendants, and only sent a copy to Defendant **KENNETH V. HEMMERLE** on October 28, 1991.

A review of Record Excerpt No. 4, will clearly show that the Court never made a ruling of the recording of the quit claim deeds controlled, and not the date of execution shown on the document.

Contrary to the statement made by the Appellee, that on November 13, 1991, the Court gave the defendants until November 30, 1991 to file a responsive pleading. It is clear that the Court, at no time, ever made a determination or finding on Defendants' Motion for Rehearing of their Motion to Dismiss (Record Excerpts No. 5). Notwithstanding, that no determination was ever had on this motion, Defendants on February 3, 1992, filed their

Answer, Affirmative Defenses and Counterclaim (See Record Excerpt Nos. 6 & 7).

Next, Appellee claims that notices of depositions were served on all defendants on January 14, 1992, setting depositions of each defendant for January 21, 1992, and that none of the defendants appeared. Clearly, notices of depositions were served on the defendant for a deposition on January 21, 1992. The first time Defendant were served a notice of depositions was the notice of deposition for March 16, 1992. This was a deposition ducus tecum, and at this time the Defendants furnished all documents in their possession to counsel for the Plaintiff **CYNTHIA A. REED, ESQ.** Ms. Reed failed and refused to seek the copying of any documents furnished to her at this deposition. On April 16, 1992, filed a motion to compel production of documents and to impose sanctions against all defendant. This motion did not include the striking of pleadings, and

entering a default. On May 11, 1992, this motion was heard and denied. The Court suggested that the parties go outside and see if they can settle the matter of production of documents. After an outside conference between the parties, Defendant **KENNETH V. HEMMERLE** agreed to assist **CYNTHIA A. REED, ESQ.** in the review of the documents and copy any and all of such documents requested by her. This meeting was for May 15, 1992. **CYNTHIA A. REED, ESQ.** arrived at the designated place (808 NE 3rd Ave.) at 5:15 PM, and refused to review the documents. Ms. Reed, furnished to **HEMMERLE** a list of documents she required. **KENNETH V. HEMMERLE, SR.** in an abundance of caution sifted through the documents and found but four that was on the list. He copied them but was unable to furnished them to Ms. Reed since the following day was a Saturday, and Ms. Reed left no time or place to receive the documents. The following Monday, May 18, 1992, at Calendar

Call, Mr. Hemmerle delivered the copied documents to Ms. Reed.

After announcing that the Plaintiff was ready for trial, Ms. Reed sought from visiting Judge Bohanon, a default and default judgment without any notice of such request. Judge Bohanon granted Ms. Reed motion predicated on perjured testimony. A month later, on June 18, 1992, the Trustee caused an order to be entered which would show non-compliance, and to support the Default Judgment.

REPLY TO APPELLEE'S ARGUMENT

POINT I.

THE BANKRUPTCY COURT ABUSED ITS DISCRETION IN GRANTING PLAINTIFF'S ORE TENUS MOTION FOR A DEFAULT AND DEFAULT JUDGMENT IN ABSENCE OF AN ORDER BEING VIOLATED BY THE DEFENDANTS

Appellee's alleged violations contained in its Argument as to Point I is without any foundation whatsoever. Appellee

claims that the Bankruptcy Court made findings on the record is an untrue statement. A review of the Record Excerpt No. 18, Calendar Call (Trial), will clearly show that at no time was there an order that was violated by the Defendants.

Federal Rules of Civil Procedure, Rule 37(b), Failure to Comply with Order. At (2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following.

It is clear, that there has never

been an order as set forth in Rule 37 that the Defendants have failed to comply with. Bankruptcy Rule 7037, is adopted from Rule 37 of the Federal Rules of Civil Procedure, and Rule 37 does not permit the striking of Defendants' pleading and/or the entry of a Default Judgment on an ore tenus motion. An application for an order to a party shall be made to the court in which the action is pending prior to the entry of any type of sanctions. Rule 37 of the F. R. Civ. P., where a default or default judgment is requested, then, it is necessary that Plaintiff comply with Rule 55(b)(2). It was required that the Plaintiff serve Defendants with a written notice of application for judgment at least 3 days prior to the hearing on such application. After the Plaintiff announced to the court that it was ready for trial, it then made an ore tenus motion for the default judgment that is now before this

court.

Where the Appellee states that the Trustee was entitled, as a matter of law, to have the Defendants' pleadings stricken, where defendants had continually failed to comply with the Bankruptcy Court's discovery orders, is an argument without substance. It is clear that the allegation stating Defendants continually failed to comply with the Bankruptcy Court's discovery orders, is nothing more than a naked allegation, without any showing of an order that the Defendants failed to comply with.

In ***Pesaplastic, C.A. v. Cincinnati Milacron Co.***, 799 F. 2d 1510 (11 Cir. 1986), the Court held that:

> It is well settled that "the standard of review for an appellate court in considering an appeal of sanctions under Rule 37 is sharply limited to a search for abuse of discretion and a determination that the findings of the trial court are 'fully supported by the record.'"

Here, there is no evidence in the record that would support the sanctions entered by the visiting judge in the striking of Defendants' pleadings and entering a default judgment.

In ***Adolph Coors Company v. Movement against Racism***, 777 F. 2d 1538 (11th Cir. 1985), the Court set forth certain precedents which would apply to the case ***sub judice***. ***National Hockey League*** 427 U.S. at 642-43, 96 S. Ct. at 2780-81; ***Carlucci v. Piper Aricraft***, 775 F. 2d 1447 (11th Cir. 1985). Further holding that the decision to enter a default judgment ought to be the last resort--ordered only if non compliance is due to willful or bad faith disregard of court orders. ***Societe International pour Participations Industrielles et Commerciales, S.A. v. Rogers***, 357 U.S. 197, 212, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958); ***Equal Employment Opportunity Commission v. Troy***

State University, 693 F. 2d 1353, 1354 (11th Cir. 1982), cert. denied, 463 U.S. 1207, 103 S. Ct. 3538, 77 L. Ed. 2d 1388 (1983); ***Morton v. Harris***, 628 F. 2d 438, 440 (5th Cir. Unit B 1980)(*per curium*), *cert. denied sub nom*, ***Morton v. Schweiker***, 450 U.S. 1044, 101 S. Ct. 1766, 68 L. Ed. 2d (1981). On appeal we will also find an abuse of discretion if less draconian but equally effective sanctions were available. ***Aztic Steel Co. v. Florida Steel Corp.***, 691 F. 2d 480-82 (11th Cir. 1982), *cert, denied*, 460 U.S. 1040, 103 S. Ct. 1433, 75 L. Ed. 2d (1983); ***Diaz v. Southern Drilling Co.***, 427 F. 2d 1118, 1126-27 (5th Cir.) *cert. denied sub nom*, ***Trefina, A.G. v. United States***, 400 U.S. 878, 91 S. Ct. 118, 27 L. Ed. 2d 115 (1970).

In ***Dean v. Ellington***, 115 Federal Rules Decisions, 576-578, (USDC N.D. Georgia 1987), the Court held that dismissal of a complaint with prejudice is such a drastic

remedy that a court should apply it only in extreme circumstances. ***Bon Air Hotel Inc. v. Time, Inc.***, 376 F. 2d 118, 121 (5th Cir. 1967). Indeed, dismissal as a sanction should not be imposed if lesser sanctions will do. ***Hashemi v. Campaigner Publications, Inc.***, 737 F. 2d 1538 (11th Cir. 1984).

In ***Securities and Exchange Commission v. Rehtorik***, 135 Federal Rules Decisions, 204 (USDC S.D. Fla. 1991), holding that sanctions for failure to comply with discovery are permitted only after party has ignored court order compelling discovery and are not directly permitted for failure to comply with party's discovery request. Absent court order compelling securities fraud defendant to answer deposition questions, Securities and Exchange Commission was not entitled to an order precluding defendant from producing any evidence concerning disgorgement of

fraudulently obtained monies.

In the case on appeal, the Defendants have never ignored an court order compelling discovery. It is clear from the record that no order has ever been ignored.

REPLY TO APPELLEE'S ARGUMENT

POINT II.

THE BANKRUPTCY COURT IS WITHOUT JURISDICTION TO VACATE OR SET ASIDE TRANSFERS WHICH WERE MADE OVER A YEAR PRIOR TO THE COMMENCEMENT OF THE BANKRUPTCY PROCEEDING, AND SUCH TRANSFERS WERE NON CORE.

Appellee's argument regarding the time and date of the transfer is misplaced. It is clear that the Officers and Directors of **SUN-ISLAND REALTY, INC.** caused the transfer of the real property held in trust, to be returned to the proper owners over a year prior to the commencement of the bankruptcy proceeding.

The suit filed by the Trustee to set aside the transfers was without jurisdiction

in the bankruptcy court. 11 USCS § 548, Fraudulent transfers and obligations, states in pertinent part, viz: (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition. If the debtor voluntarily or involuntarily---

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted or (2)(A) receive less than a reasonably equivalent value in exchange for such transfer or obligation; and (B)(i) was insolvent or the date that such transfer was made or such obligation; (ii) was engaged in business or transaction, or was about to engage in

business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or (iii) intended to incur, or believed that the debtor could incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, of the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545,

or 547 of the title [11 USCS § 544, 545, or 547]. a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

It is clear that at the time of the transfer, when the real property was returned to the proper owners, the debtor was solvent, the transfer was not made with any actual intent to hinder, delay, or defraud a past or future creditor. Since the transfer was made a year prior to the commencement of the case, the Bankruptcy Court is without jurisdiction to avoid such transfers.

Next, the Appellee alleges that since the adversary proceeding seeks to set aside a fraudulent transfer, and requests turnover of property of the estate. Both of these matters are core proceedings pursuant to 28 U.S.C. § 157(B)(2)(E)(H). It is clear that 28 USCS § 157(b)(2)(E)(H), deals with (E) orders to turn over property of the estate and (H) are proceedings to determine, avoid, or recover fraudulent conveyances. The property that forms the basis of the adversary complaint was never property of the

estate, nor was it ever fraudulent conveyed, as such, it is clear that the entire adversary proceeding was a non core proceeding.

Appellee's argument that pursuant to Florida Statutes § 695.01, that no conveyance of real property shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the conveyance is recorded according to law. Appellants do not disagree with this contention, however, it is clear that neither the trustee or the estate were ever creditors or subsequent purchaser for a valuable consideration. After the return of the Defendants' real property, no relationship existed. For the Appellee to suggest that the estate is in privity with the Defendants' is without merit. All obligations owed to **SUN-ISLAND REALTY, INC.** had been satisfied,

and the property was returned to the rightful owners over a year prior to the commencement of the bankruptcy proceeding. Furthermore, Appellee's assertion as to whether the Florida Law is relevant and applicable to a Trustee in bankruptcy, is erroneous, as even a trustee must obey the law in the state which he is conferred the trusteeship.

Appellee suggest that even if 11 USCS § 548 did not apply for the avoidance of the transfer of the property, than 11 USCS § 544 would apply. Indeed, the trustee is not a lien creditor and is not successor to the Defendants as certain creditors and purchaser necessary for 11 USCS § 544 to apply.

Next the Appellee argues that it is too late to raise jurisdictional matters at this point. This argument is also without merit, since jurisdiction can be raised at any time.

REPLY TO APPELLEE'S ARGUMENT

POINT III

THE CHAPTER 11 TRUSTEE DOES NOT HAVE AUTHORITY TO SUCCEED HIMSELF AFTER A CONVERSION TO CHAPTER 7 PURSUANT TO 11 USCS § 348(e).

Title 11 USCS § 348(E) states: Conversion of a case under section 706, 1112, 1307 or 1208 of this title [11 USCS § 706, 1112, 1307 OR 1208] terminates the services of any trustee or examiner that is serving in the case before such conversion. (S. Rept. No. 95-989 to accompany S. 2266, 95th Congress, 2d Session (1978) p. 48).

REPLY TO APPELLEE'S ARGUMENT
POINT IV

THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES FOR A TRIAL BY JURY AS TO ALL ISSUES AT LAW.

Appellee contends that Appellants' request for jury trial was untimely, and was not brought to the attention of the Court until the filing of the motion for clarification and objection to non-jury trial

on May 12, 1992, only one week before trial. Again, a misleading argument. The Defendants' made their demand for a jury trial at the time they filed their Answer to Plaintiff's complaint. Nowhere can it be found that a jury trial demand must be continually made. Defendants need only to timely file their demand for a jury trial at during the course of pleading. It is clear, that the proper time for such demand is at the time of the responsive pleading.

Next, the Appellee claims that the case law cited only permits a jury trial when no claim is made against the bankruptcy estate. At no time has any of the Defendants filed a proof of claim against the estate. For the Appellee to suggest that Defendants' Compulsory Counterclaim against the Trustee was a claim against the estate, is without merit.

Appellee next claims that Defendants

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

are not entitled to a jury trial since the claim made by the complaint was not a monetary claim. A review of the Complaint (Record Excerpt No. 2) will clearly show that said complaint is seeking a monetary claim. Paragraph 7 of the Complaint seeks the turnover of rents which is a monetary claim. Paragraph 9 states that the Debtor is the true owner of the properties, and has received none of the rental income. Paragraph 10, asks the Court for an order to account for all rental income received by the Defendants and to turnover that income to the Trustee as property of the estate. Plaintiff's prayer clearly shows that the adversary complaint seeks a money judgment, viz:

> WHEREFORE, the Trustee prays that this Court enter judgment in favor of the plaintiff and against the defendants, setting aside the transfers; that the Court order an accounting and turnover, and further that the Court enter money judgments against the defendants

pursuant to 11 U.S.C. § 550 for damages and the costs of this action.

Appellee contends that Appellants are entitled to a jury trial for two separate reasons. (1) they filed a counterclaim against the trustee, which is tantamount to a claim. And (2), the Trustee was seeking to avoid the transfer of real property and not a monetary transfer. Defendants reply to (1), is that a compulsory counterclaim against the Trustee is not tantamount to a claim against the estate. Had the Defendant not raised there claim by way of the counterclaim, it would have become res judicata, and they would be barred from ever raising that claim. Defendant reply to (2), is that a review of the Complaint will clearly show that the trustee was not only seeking to avoid the transfer of real property but was in fact seeking money damages and the collection of rents received by the Defendants.

Appellee cites ***Granfinanciera, S.A. v. Nordberg***, 492 U.S. 33, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989), and stated that in ***Granfinanciera*** the Court found that the demand was purely monetary, and that plaintiff had not requested an accounting or other specifically equitable form of relief. Although the Plaintiff sought an accounting, such claim cannot in of itself invoke the equitable process when legal issues are before the Court. In ***Re West Coast Video Enterprises, Inc.***, 145 B.R. 484 (E.D. **Pa**. 1990), the Court held, citing ***In Re Brenner***, 119 B.R. 495, 497 (Bankr. E.D. **Pa**. 1990), "We recognize that some of the Debtor's claims are equitable in nature and hence not susceptible to a jury demand, however, the Defendants have not eliminated their right to a jury trial by filing a proof of claim. An intermingling of issues triable by jury with issues not triable by jury

requires that the entire proceeding be tried to a jury, if same is properly demanded. See ***In Re Numedco, Inc.***, 1991 WL 91092, slip op. at 1 (Bankr. E.D. **Pa**. 1991.

The Defendants have been denied their right to a trial by jury in violation of the Seventeenth Amendment to the United States Constitution.

CONCLUSION

Premises considered, and the case law advanced herein, it is respectfully requested that the Default Judgment entered by the Bankruptcy Court, and the United States District Court's Order Affirming the Default Judgment be reversed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY, that a true and correct copy of the foregoing Reply Brief has been furnished by U. S. Mail to **LESLIE GERN CLOYD, ESQ.**, ATTORNEY FOR **DANIEL L. BAKST, , ESQ.**, Trustee, 2450 Metrocentre Boulevard, Post Office Drawer 3948, West Palm Beach, Florida 33402-3948, this 16th day of May, 1994.

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